





6  
Entered

JUN 20 1969

F 2302

# San Francisco Law Library

436 CITY HALL

No. 192693


## EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.





Digitized by the Internet Archive  
in 2010 with funding from  
Public.Resource.Org and Law.Gov









IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

WILLIAM GARRETT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

V. 3428

APPELLEE'S BRIEF

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR.,  
United States Attorney,

PHILLIP W. JOHNSON,  
Assistant U.S. Attorney,

325 West "F" Street  
San Diego, California 92101

Attorneys for Appellee,  
United States of America.

FILED

JUN 9 1967

WM. B. LUCK, CLERK

JUN 13 1967





IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

WILLIAM GARRETT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR.,  
United States Attorney,

PHILLIP W. JOHNSON,  
Assistant U.S. Attorney,

325 West "F" Street  
San Diego, California 92101

Attorneys for Appellee,  
United States of America.





## TOPICAL INDEX

	<u>Page</u>
Table of Authorities	ii
I JURISDICTIONAL STATEMENT	1
II STATEMENT OF THE CASE	2
III ERROR SPECIFIED	3
IV STATEMENT OF THE FACTS	4
V ARGUMENT	9
A. THE MARIHUANA OBTAINED FROM APPELLANT'S RESIDENCE WAS LAWFULLY SEIZED.	9
B. INTRODUCTION OF EVIDENCE OBTAINED BY USE OF THE RADIO BROADCASTING DEVICE DID NOT VIOLATE THE SELF-INCRIMINATION PRIVILEGE.	12
C. INTRODUCTION OF EVIDENCE OBTAINED BY USE OF THE RADIO BROADCASTING DEVICE DID NOT VIOLATE APPELLANT'S RIGHT TO COUNSEL.	13
D. INTRODUCTION OF EVIDENCE OBTAINED BY USE OF THE RADIO BROADCASTING DEVICE DID NOT VIOLATE THE FOURTH AMENDMENT.	15
E. THERE IS NO EVIDENCE SUPPORTING THE CLAIM THAT APPELLANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY FAILURE TO HOLD A PRELIMINARY HEARING	16
F. THE TRIAL COURT'S COMMENTS UPON THE EVIDENCE DID NOT CONSTITUTE ERROR.	16
G. EVIDENCE RELATING TO THE PREVIOUS SMUGGLING TRANSACTION DID NOT CONSTITUTE ERROR.	18
VI CONCLUSION	19
CERTIFICATE	20





TABLE OF AUTHORITIES

Cases

Page

Bank of Eureka v. Partington, 91 F.2d 587, 589 (9th Cir. 1937)	12
Battaglia v. United States, 349 F.2d 556, 559 (9th Cir. 1965)	14
Benson v. People of State of California, 336 F.2d 791 (9th Cir. 1964)	13
Enriquez v. United States, 188 F.2d 313, 315-16 (9th Cir. 1951)	19
Escobedo v. Illinois, 378 U.S. 478 (1964)	15
Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931)	10
Grier v. United States, 345 F.2d 523 (9th Cir. 1965)	14
Hardt v. Kirkpatrick, 91 F.2d 875, 878 (9th Cir. 1937)	12
Harris v. United States, 331 U.S. 145, 148, 151-54 (1947)	10
Hoffa v. United States, 385 U.S. 293, 303-04 (1966)	12
Karrell v. United States, 247 F.2d 706, 709-10 (9th Cir. 1957)	14
Ker v. California 374 U.S. 23, 41-42 (1963)	10
Klepper v. United States, 331 F.2d 694, 698 (9th Cir. 1964)	19
Kremen v. United States, 353 U.S. 346 (1957)	10
Lopez v. United States, 373 U.S. 427, 437-39 (1963)	15



# TABLE OF AUTHORITIES (continued)

	<u>Page</u>
Lovely v. United States, 175 F.2d 312, 315 (4th Cir. 1949)	18
Massiah v. United States, 377 U. S. 201 (1964)	13
Miranda v. Arizona 384 U.S. 436, 444 (1966)	15
Murphy v. Waterfront Comm'n, 378 U.S. 52, 65-66 (1964)	14
Osborn v. United States, 385 U. S. 323 (1966)	13
On Lee v. United States, 343 U.S. 747, 750-54 (1952)	15
Olmstead v. United States, 277 U.S. 438, 464, 466 (1928)	16
Springer v. Best, 264 F.2d 24, 27-28, n. 2 (9th Cir. 1956)	11
Teasley v. United States, 292 F.2d 460, 465 (9th Cir. 1961)	19
Todisco v. United States, 298 F.2d 208, 212 (9th Cir. 1961)	12
Union Pacific Railroad Co. v. Bridal Veil Lumber Co., 219 F.2d 825, 833 (9th Cir. 1955) cert. denied, 350 U.S. 981 (1956)	12
United States v. Lefkowitz, 285 U.S. 452 (1932)	10
United States v. Vanegas, 216 F.2d 657, 658 (9th Cir. 1954)	12
Warden v. Hayden, United States Supreme Court, No. 480, May 29, 1967	11





# TABLE OF AUTHORITIES (continued)

	<u>Page</u>
Wright v. United States , 192 F.2d 595, 596 (9th Cir. 1951)	19
Theobald v. United States , 371 F.2d 769, 771 (9th Cir. 1967)	10

## Statutes

Title 18, United States Code , Sections 2 and 3231	1
Title 21, United States Code , Section 176a	1, 2
Title 28, United States Code , Sections 1291 and 1294	1
Rule 30, of the Federal Rules of Criminal Procedure	18





IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

WILLIAM GARRETT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in both counts of a two-count indictment following trial by jury.

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 2 and 3231, and Title 21, United States Code, Section 176a. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.



STATEMENT OF THE CASE

Appellant was charged in both counts of a two-count indictment returned by the Federal Grand Jury for the Southern District of California. Count One charged that appellant William Garrett, Barbara Garrett, John Ford, Larry Sherman, and other persons unknown to the Grand Jury, agreed, confederated, and conspired to commit the offenses of knowingly, with intent to defraud the United States, importing and bringing marihuana into the United States from Mexico, and smuggling and clandestinely introducing marihuana into the United States from Mexico, without presenting said marihuana for inspection and without entering and declaring said marihuana, and concealing and facilitating the concealment and transportation of marihuana which had been imported into the United States contrary to law, in violation of Title 21, United States Code, Section 176a [C.T. 2-3 ]<sup>1/</sup>.

Count Two charged that Larry Sherman, with intent to defraud the United States, knowingly smuggled and clandestinely introduced into the United States from Mexico approximately 26 pounds of marihuana, which marihuana should have been invoiced, and knowingly imported and brought said marihuana into the United States from Mexico contrary to law. It also was alleged that appellant and defendants Barbara Garrett and Ford knowingly aided, abetted, counseled, induced, and procured the commission of that

---

<sup>1/</sup>  
"C.T." refers to the Clerk's Transcript.





offense [C.T. 4] .

Jury trial of appellant commenced on June 22, 1965, before United States District Judge James M. Carter. Appellant was found guilty as charged in both counts on June 25, 1965 [C.T. 5, 31] .

Thereafter, on July 26, 1965, appellant was sentenced to six years in prison upon each count, to run concurrently [C.T. 42] . He filed a timely notice of appeal [C.T. 43].

### III

#### ERROR SPECIFIED

Appellant specified the following points upon appeal:

1. Introduction of evidence allegedly unlawfully seized at appellant's residence.
2. Introduction of evidence of statements overheard by use of a listening device, in alleged violation of the privilege against self-incrimination.
3. Introduction of evidence of appellant's incriminatory statements, in alleged violation of the right to counsel.
4. Alleged unlawful search and seizure involving intrusion of electronic listening device within appellant's home without his knowledge or consent.
5. Alleged violation of the right to a preliminary hearing within a reasonable time.
6. Alleged improper comments upon the evidence by the trial Court.
7. Alleged error in the introduction of evidence relating to a previous





transaction.

(Appellant Garrett's Brief, Index).

#### IV

#### STATEMENT OF THE FACTS

##### A. The Motion to Suppress Evidence.

Appellant has not provided this Court with a transcript of any testimony received at the hearing of any motion to suppress physical evidence seized from his residence.

##### B. The Trial.

In October 1964, John Arthur Ford took a vacation trip to Compostela, Mexico, about 1500 miles from Los Angeles. Before he left, appellant told him to keep his eyes open for anything available. Near the end of December, Ford wrote a letter to appellant and informed him that he had met a man who had marihuana available [R.T. 84, 94].<sup>2/</sup>

In reply to this letter, Ford received a letter from appellant. The letter included the following language:

"The set-up and deal sounds great - have 300 on hand right now for three at 50, four at 40 and will have more by time you get here - at least another 2-300. Be sure to bring a bit of the pure raw  $\tilde{O}$  as I must make this gas - at least \$50 for me. . . . Buy a little fly to for our mad sex f(r)iends. Watch your partner -

---

<sup>2/</sup>

"R.T." refers to the Reporter's Transcript.



how does he cross over - if with you makes customs more a problem, maybe? It makes you stand out of the herd as not many Yanks bring others back with them. Dig!

"The prices you gave must be mine - if you're paying that much in Compostela - buy in tj, it's cheaper! Guadalajara goes for 20-25 right?!" [R.T. 85, 124-25].

The letter also referred to chicle, dexedrina, benzadrina,

"Fenidantoin," codeine, ocelots, and "Meth." "Pure raw  $\bar{O}$  " was pure raw opium. [R.T. 120, 124-26].

As a result of this letter, Ford received money from appellant by means of a telegraph money order, and he used the money for the purchase of 10 kilos or 10 pounds of marihuana, having an arrangement to bring back marihuana and deliver it to appellant for sale. He brought the marihuana across the border without declaring it. He delivered the marihuana to appellant in January 1965 [R.T. 68-69, 71, 73, 86].

In February 1965, appellant Garrett, Barbara Garrett, and Ford engaged in a conversation in appellant's house in Santa Monica. Ford told appellant that he had met a man who had marihuana for sale. Appellant stated that he would sell the marihuana that had just been delivered by Ford and that Ford possibly could return to Mexico in the future and get some more marihuana and deliver it to appellant [R.T. 68-69, 74-76, 87].

Approximately one week later, appellant, Garrett, Ford, Larry Sherman, and possibly Barbara Garrett, engaged in a conversation at the same residence.





Appellant stated that as soon as he sold the marihuana previously brought by Ford, he would be able to take care of some more if they (Ford and Sherman) could bring it from Mexico. Appellant offered \$50 for every kilo (2-1/4 pounds per kilo) of marihuana that Ford would bring back [R.T. 77-78, 88-89] .

An additional conversation occurred near the middle of February, involving appellant, Ford, and Mrs. Garrett. Appellant gave Ford \$100 as an advance for the purchase of marihuana in Mexico and told Ford that he, appellant, could handle any marihuana that Ford would bring back [R.T. 90, 115] .

Ford and Sherman later left Los Angeles on approximately February 20 and drove to Compostela in the Mexican state of Nayarit. They went to San Blas and returned to Compostela, where Ford purchased two large bags of marihuana, which were to be delivered to appellant. They returned to the United States with the marihuana and were arrested at the border [R.T. 91-93].

Sherman was driving the vehicle when it entered the United States from Tijuana, Mexico, at approximately 6:20 p.m. on March 3, 1965. Ford was a passenger [R.T. 11-12, 14-15, 26].

Ford and Sherman stated that they were bringing no merchandise from Mexico. The large bags were found in the trunk of the vehicle by Immigration Inspector Bernard Berlin [R.T. 11-13] . The bags contained 26 pounds of marihuana, having a value of approximately \$1300. There was a stipulation concerning the nature of the substance [R.T. 13, 58-59, 164]. There also was testimony as well as a stipulation in regard to the "chain of possession" of the exhibits [R.T. 25-27, 30, 179-80, 182-83] .



After Sherman was arrested, he told Customs Agent Clarence Spohn that he would cooperate. They proceeded to Santa Monica in Sherman's vehicle. Some of the marihuana had been returned to the trunk of the vehicle, and a small transmitter-recording device was placed upon Sherman for the purpose of determining whether appellant was part of the conspiracy. [R.T. 28-29, 32-33, 55-56, 130-31].

Sherman went to appellant's house at approximately 3 a.m. Appellant was in the garage. Sherman told appellant, "Garrett, I have your grass." ("Grass" meant "marihuana"). [R.T. 37-38, 59, 131-33].

Appellant replied, "Where is John Ford?" The conversation continued as follows:

Sherman: "John's sick. He had to go to his house."

Appellant: "Where is the grass?"

Sherman: "It is outside in the car."

Appellant: "Well, I am not going to pick up any grass out of a car tonight at this hour. The bars are all closed. The only people on the street are black and white. I tried that once and got burnt." [R.T. 37-38].  
("Black and white" referred to police cars).

Appellant also stated that he was "too high" to do anything. The conversation continued:

Sherman: "What do you want to do?"

Appellant: "Well, bring it around tomorrow. Pull into the alley beside the garage. There is a lot of people and it won't cause any suspicion."

Sherman: "Well, what do you want me to do? Drive around all night





with this marihuana in the car?"

Appellant: "You should complain. I have got to hang onto it for two days before I can get rid of it. Tell John I have already got ten kilos sold, and he will get his money in a couple of days. I have also made a connection, a big connection, in Hollywood who deals with the movie colony, but I am going slow with that one." [R.T. 38] .

Appellant said that the connection in Hollywood could handle twice as much as they had. He told Sherman to bring it to the garage in the morning [R. T. 51, 53] .

Sherman returned to the area at 9 a.m. on the following morning, parked the vehicle next to the garage, and entered the house. He had a transmitter device. Appellant told Sherman to stay, left the house, went to Ford's house, went inside, stayed a short time, returned to his vehicle, and subsequently returned home and talked to Sherman:

Appellant: "Something smells here. John Ford didn't sleep in his bed all night. I thought he was sick."

Sherman: "Well, maybe he decided to go to his girl friend's house." [R.T. 39, 61, 64-66] .

Appellant and Sherman went to a girl's house and knocked on the door. There was no response. Appellant said, "Well, like I suspected, he is not here." The subject of making delivery was again mentioned. Appellant said, "You know I won't accept delivery without the principal man involved being there." They returned to appellant's house [R.T. 140-41] .

Customs Agent David W. Hopkins obtained a warrant for the arrest



of appellant on March 4, 1965. Appellant was arrested at his residence, and the officers searched the premises. A small amount of manicured marihuana was found inside of a small book under a mat in the living room. A portion of a smoked marihuana cigarette was found in a vase in the living room. A small quantity of marihuana was found in a plastic bag in an oatmeal box on top of a refrigerator in the kitchen [R.T. 155-56, 159-162, 164, 166-67]. There was a stipulation concerning the substance and "chain of possession" of these items [R.T. 161-162, 164-65, 181-82].

Appellant testified that he had no arrangement with Ford or Sherman for bringing marihuana, that he paid Ford \$100 for a tape recorder and converter, that he asked Ford to bring pre-Columbian statues and some animals back from Mexico, that he was aware that it was illegal to take the statues out of Mexico, that he thought that Sherman was attempting to deliver statues at 3 a.m. at appellant's residence, and that he had been drinking heavily and did not want to unload the statues at that time. He denied that Sherman said, "I have got your grass." [R.T. 184-85, 189-92, 199].

The officers testified that they heard appellant (or the man talking to Sherman) ask, "Where is the grass?" [R.T. 37, 229].

## V

### ARGUMENT

#### A. THE MARIHUANA OBTAINED FROM APPELLANT'S RESIDENCE WAS LAWFULLY SEIZED.

Appellant contends that a partial marihuana cigarette and a small





quantity of marihuana were unlawfully seized by officers and improperly received in evidence at his trial, in violation of the Fourth Amendment.

This objection concerns a partial marihuana cigarette found in a vase in the living room of appellant's residence, a quantity of semi-manicured marihuana found in a book under a mat in the living room, and marihuana debris found in an oatmeal box on top of a refrigerator in the kitchen [R.T. 159-60, 162, 166-67] .

The search followed the arrest of appellant in the residence. The officers had a warrant of arrest [R.T. 159-60] . Since the arrest was lawful, the search of the premises at the scene of the arrest was entirely reasonable.

Harris v. United States, 331 U.S. 145, 148, 151-54 (1947);

Ker v. California, 374 U.S. 23, 41-42 (1963);

Theobald v. United States, 371 F.2d 769, 771 (9th Cir. 1967) .

The search may validly extend beyond the room in which the arrest occurs.

Harris, supra, at p. 152.

Appellant cites Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931); United States v. Lefkowitz, 285 U.S. 452 (1932); and Kremen v. United States, 353 U.S. 346 (1957) . There is no similarity between the instant case and the Go-Bart and Kremen cases. Go-Bart involved the seizure of a great mass of papers, journals, account books, letter files, insurance policies, checks, index cards, etc. In Kremen the officers seized the entire contents of a cabin and transported the items seized to a point about 200 miles away. The inventory of the items seized amounted to nearly 11 pages of small print. In the instant case, the only seizure in large



quantity allegedly involved 26 motion picture reels, a fact that was not brought to the attention of the Court until after the trial was completed. Even then, there was no testimony relating to the quantity of films, although defense counsel made a remark in regard to the matter [Supplemental Transcript of Record, p. 8 of second numbered series] .

The decision in Lefkowitz, supra, was based upon the distinction between searches for mere evidence and searches for instrumentalities of crime, contraband, stolen goods, or forfeited property. This distinction does not apply to seizures of evidence.

Warden v. Hayden, United States Supreme Court, No. 480, May 29, 1967.

If the distinction applies to searches, as distinguished from seizures, this is of no assistance to appellant, because there is no evidence that the officers were searching for mere evidence as distinguished from contraband (i.e., marihuana) .

Furthermore, appellant is precluded from questioning the Trial Court's decision on the motion to suppress evidence, because he has not included, as part of the record upon this appeal, the testimony, if any, received at the hearing of the motion to suppress evidence. Issues which cannot be determined from the record upon appeal are presumed to be waived.

Springer v. Best, 264 F.2d 24, 27-28, n. 2 (9th Cir. 1956) .

The appellant must provide a sufficient record to positively show the alleged error.





United States v. Vanegas, 216 V.2d 657 (9th Cir. 1954).

In the absence of a record of testimony, it is presumed that the evidence supports the decision in the trial court.

Union Pacific Railroad Co. v. Bridal Veil Lumber Co., 219 F.2d 825, 833 (9th Cir. 1955), cert. denied, 350 U.S. 981 (1956);

Hardt v. Kirkpatrick, 91 F.2d 875, 878 (9th Cir. 1937);

Bank of Eureka v. Partington, 91 F.2d 587, 589 (9th Cir. 1937).

B. INTRODUCTION OF EVIDENCE OBTAINED BY USE OF THE RADIO BROADCASTING DEVICE DID NOT VIOLATE THE SELF-INCRIMINATION PRIVILEGE.

Appellant contends that his privilege against self-incrimination was violated by the admission of statements overheard by use of an electronic listening device without his consent.

The use of a secret radio transmitter carried upon the person of a Government agent or informant does not constitute a violation of the privilege against self-incrimination.

Todisco v. United States, 298 F.2d 208, 212 (9th Cir. 1961).

Statements are not involuntary under the Fifth Amendment merely because they are made to a Government informant who conceals his true role.

Hoffa v. United States, 385 U.S. 293, 303-04 (1966).

"In the present case no claim has been or could be made that the petitioner's incriminating statements were the product of any sort of



coercion, legal or factual. The petitioner's conversations with Partin and in Partin's presence were wholly voluntary."

Hoffa, supra, at p. 304.

In Osborn v. United States, 385 U. S. 323 (1966), the Supreme Court recently upheld the use of a recording device secretly taken into the defendant's office by a Government informant. Appellant cites Massiah v. United States, 377 U. S. 201 (1964), in which great emphasis was placed upon the fact that the defendant was secretly interrogated after he had been indicted and had retained an attorney. These factors distinguish Massiah from the instant case, in which appellant had not been indicted and in which there is no evidence that appellant had an attorney at the time of the conversations. Appellant was merely a suspect, standing in the same relationship as the suspects who talked to the secret Government informants in Hoffa and Osborn, supra, as well as Benson v. People of State of California, 336 F.2d 791 (9th Cir. 1964). No violation of the Constitutional rights was found in those cases.

C. INTRODUCTION OF EVIDENCE OBTAINED BY USE OF THE RADIO  
BROADCASTING DEVICE DID NOT VIOLATE APPELLANT'S RIGHT  
TO COUNSEL.

Appellant asserts that his right to counsel was violated by the introduction of evidence obtained by use of the secret radio transmitter carried by Sherman.



coercion, legal or factual. The petitioner's conversations with Partin and in Partin's presence were wholly voluntary."

Hoffa, supra, at p. 304.

In Osborn v. United States, 385 U. S. 323 (1966), the Supreme Court recently upheld the use of a recording device secretly taken into the defendant's office by a Government informant. Appellant cites Massiah v. United States, 377 U. S. 201 (1964), in which great emphasis was placed upon the fact that the defendant was secretly interrogated after he had been indicted and had retained an attorney. These factors distinguish Massiah from the instant case, in which appellant had not been indicted and in which there is no evidence that appellant had an attorney at the time of the conversations. Appellant was merely a suspect, standing in the same relationship as the suspects who talked to the secret Government informants in Hoffa and Osborn, supra, as well as Benson v. People of State of California, 336 F.2d 791 (9th Cir. 1964). No violation of the Constitutional rights was found in those cases.

C. INTRODUCTION OF EVIDENCE OBTAINED BY USE OF THE RADIO  
BROADCASTING DEVICE DID NOT VIOLATE APPELLANT'S RIGHT  
TO COUNSEL.

Appellant asserts that his right to counsel was violated by the introduction of evidence obtained by use of the secret radio transmitter carried by Sherman.





However, since a defendant's Constitutional rights are not violated by use of a secret recording device carried upon the person (Osborn, supra), it is evident that the employment of the radio device also would not violate Constitutional rights.

The instant case is very similar to the facts of Grier v. United States, 345 F.2d 523 (9th Cir. 1965). <sup>3/</sup> In that case, Brown was arrested in connection with a package of heroin which he brought into the United States from Mexico at San Ysidro. Brown implicated Grier and agreed to cooperate with the officers and complete the delivery. Brown carried a concealed radio transmitter when he talked to Grier, and an officer listened to the conversation and later testified concerning Brown's incriminatory statements. This Court held that Grier's Sixth Amendment right to counsel was not violated:

"One is not entitled to counsel while committing his crime . . . ."  
(at p. 524).

In Battaglia v. United States, 349 F.2d 556, 559 (9th Cir. 1965), the defendant alleged that admission of evidence obtained by the secret use of a radio transmitting device by a police informant violated his right to counsel. This Court rejected the argument and affirmed the conviction.

---

<sup>3/</sup> The facts of the case are outlined in the Government brief, No. 19472. It is proper to refer to appellate briefs in order to determine the full significance of appellate decisions, e.g., Murphy v. Waterfront Comm'n, 378 U.S. 52, 65-66 (1964); Karrell v. United States, 247 F.2d 706, 709-10 (9th Cir. 1957).



Appellant cites Escobedo v. Illinois, 378 U.S. 478 (1964), and Massiah, supra. However, Escobedo only applies to persons who are in custody or deprived of freedom of action in a significant way.

Miranda v. Arizona, 384 U.S. 436, 444 (1966).

Use of the secret radio device by a Government informant violates neither Escobedo nor Massiah.

Battaglia, supra, at p. 559.

D. INTRODUCTION OF EVIDENCE OBTAINED BY USE OF THE RADIO  
BROADCASTING DEVICE DID NOT VIOLATE THE FOURTH AMENDMENT.

Appellant contends that the introduction of evidence obtained by the use of the concealed radio device, carried upon the person of Sherman, constituted an unlawful search and seizure.

Whether or not the recording device actually entered appellant's house does not appear to be clear from the record. In regard to the most important conversation, Agent Spohr testified that the conversation occurred after "a man came to the door." [R.T. 37] .

However, assuming arguendo that the device entered the building, there was no violation of the Fourth Amendment.

On Lee v. United States, 343 U.S. 747, 750-54 (1952) (radio device); Lopez v. United States, 373 U.S. 427, 437-39 (1963) (recording device);

Osborn, supra, 385 U.S. 323 (1966) (recording device);





Benson, supra, 336 F.2d 791 (recording device);

Todisco, supra, 298 F.2d 208 (radio device).

Furthermore, merely listening to sounds constitutes neither a search nor a seizure.

Olmstead v. United States, 277 U.S. 438, 464, 466 (1928).

Appellant apparently does not contend that Sherman entered his house without permission, if he actually entered at all. The record is silent upon these points.

E. THERE IS NO EVIDENCE SUPPORTING THE CLAIM THAT APPELLANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY FAILURE TO HOLD A PRELIMINARY HEARING.

Although appellant contends that his Constitutional rights were violated by failure to hold a preliminary hearing within a reasonable time, he does not cite any portions of the record in support of this claim, and appellee has been unable to locate evidence in the record tending to support the claim.

Furthermore, assuming arguendo that there was not a speedy preliminary hearing, there is no showing that the alleged irregularity affected appellant's substantial rights at trial or prejudiced his defense in any manner.

F. THE TRIAL COURT'S COMMENTS UPON THE EVIDENCE DID NOT CONSTITUTE ERROR.

Appellant contends that the trial Judge committed error by informing



the jurors that there was a conflict in the testimony between appellant and the Government witnesses and that the case "is largely to be determined by who you believe. What witnesses do you believe?" [R.T. 337] .

The trial Judge also told jurors that the comments "are only the Judge's expressions of opinion as to the facts, and you may disregard them entirely since you are the sole judges of the facts," that "I do not intend to comment, to tell you which witnesses I believe or disbelieve," and that

"What I have said are only my comments; you may ignore them entirely. You are the sole judges of the facts and it is not my responsibility." [R.T. 336-37] .

The jurors also had been instructed that "You as jurors are the sole judges of the credibility of the witnesses and the weight their testimony deserves." [R.T. 312] .

It is clear that the trial Judge merely informed the jurors of the obvious fact that the critical issue involved the question of which witnesses to believe. Appellant complains that the Court failed to mention the testimony of John Haag, who testified that appellant engaged in speculative discussion regarding the "possibility" of importing pre-Columbian art work for sale [R.T. 241] . This testimony was relatively innocuous and unimportant, in view of the direct conflict between appellant's testimony and the testimony of Ford, Sherman, Spohr, and Bill Freeman in regard to the marihuana conspiracy. This conclusion is fortified by the fact that Haag's testimony was not emphasized in the closing arguments to the jury.



It also should be noted that a trial judge may assist a jury by commenting upon the evidence and drawing the attention of the jurors to parts of the evidence which he considers to be important.

Lovely v. United States, 175 F.2d 312, 315 (4th Cir. 1949).

Furthermore, appellant failed to object to the judge's comments during the trial [R.T. 337, 346] .

Rule 30 of the Federal Rules of Criminal Procedure provides in part as follows:

"No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

G. EVIDENCE RELATING TO THE PREVIOUS SMUGGLING TRANSACTION DID NOT CONSTITUTE ERROR.

Appellant asserts that error was committed by the admission of evidence relating to the first marihuana-smuggling transaction.

Although appellant refers to this evidence as evidence of another offense, the first venture actually was part of the crime charged in Count One of the indictment. It was part of the same conspiracy commencing "at a date unknown to the Grand Jury and continuing to on or about March 4, 1965 . . . ." [C.T. 2].

Consequently, it is unnecessary to discuss those decisions relating





to admissibility of evidence of "other" offenses, although the following decisions fully support the conclusion that the evidence would have been entirely admissible under the "other offenses" exceptions:

Klepper v. United States, 331 F.2d 694, 698 (9th Cir. 1964);

Wright v. United States, 192 F.2d 595, 596 (9th Cir. 1951);

Enriquez v. United States, 188 F.2d 313, 315-16 (9th Cir. 1951);

Teasley v. United States, 292 F.2d 460, 465 (9th Cir. 1961).

Assuming that the "other offense" rule applies, appellant states that the proof must be plain, clear, and conclusive. He refers to the letter which was sent to Ford. However, the contents of the letter were plainly explained by Ford's testimony. Viewing Ford's testimony in the light most favorable to the Government, the proof of the alleged "other offense" was plain, clear, and conclusive.

## VI

### CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

EDWIN L. MILLER, JR.,  
United States Attorney

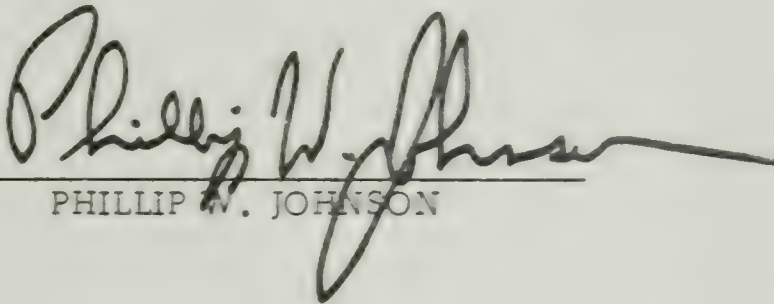
PHILLIP W. JOHNSON  
Assistant U. S. Attorney

Attorneys for Appellee,  
United States of America.



CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

  
\_\_\_\_\_  
PHILLIP W. JOHNSON





IN THE UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT

UNITED STATES OF AMERICA, ET AL.,

Appellants,

v.

BETTY K. FURUMIZO, ET AL.,

Appellees.

BETTY K. FURUMIZO, ET AL.,

Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

APPELLANT UNITED STATES OF AMERICA'S  
PETITION FOR REHEARING

CARL EARDLEY,  
Acting Assistant Attorney General,

HERMAN T. F. LUM,  
United States Attorney,

ALAN S. ROSENTHAL,  
HOWARD J. KASHNER,  
Attorneys,  
Department of Justice,  
Washington, D.C. 20530.

*See Vol.  
3375*

FILED

SEP 17 1967

U.S. COURT OF APPEALS

SEP 18 1967



IN THE UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT

---

No. 20,641

UNITED STATES OF AMERICA, ET AL.,  
Appellants,

v.

BETTY K. FURUMIZO, ET AL.,  
Appellees.

---

BETTY K. FURUMIZO, ET AL.,  
Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,  
Appellees.

---

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

---

APPELLANT UNITED STATES OF AMERICA'S  
PETITION FOR REHEARING

---

Appellant United States of America respectfully petitions  
his Court for rehearing of the judgment entered in this case on  
August 9, 1967. The bases for this petition are set forth below:

1. Appellees Betty K. Furumizo, et al., commenced this action  
against the United States and Baker Aircraft Sales, Inc., to

recover damages for the death of Robert T. Furumizo in an airplane accident at Honolulu International Airport. After trial, the district court held the United States liable on the ground that Federal Aviation Agency control tower personnel did not attempt "to exercise their reasonable judgment" and did not attempt "to hold up the clearance a sufficient time to minimize the acute danger" to the Piper from the DC-8's wake turbulence (245 F. Supp. at 992, 1002-1003). This Court sustained the district court's finding of governmental negligence on the ground that the controller failed to give a second warning on turbulence (Slip Op., p. 3).

2. The second-warning theory of governmental liability was raised in appellee Furumizo's amended complaint or in the district court's pretrial order, and the case was not tried on that theory. In the district court, appellee Furumizo's theory was that the United States negligently failed "to provide proper and adequate safeguards for the protection of the decedent from the hazards of 'turbulence wake,'" and negligently cleared the Piper "for takeoff directly into the 'jet wash' of [the] DC-8" (245 F. Supp. at 985). The district court did not make any findings of fact and conclusions of law stating that a second warning should have been issued and that the failure to issue it was a proximate cause of the accident. While the district court concluded that the failure of the tower controllers "to exercise any judgment under the circumstances constituted negligence . . . and was a contributing cause of the accident" (245 F. Supp. at 992), it failed to determine what act



controllers should have taken when they saw the Piper begin its take-off. Although this Court stated that the second-warning theory was fully supported by the evidence" (Slip Op., p. 3), evidence was introduced on the issue of whether the controllers might have prevented the accident by issuing a second warning in the time between the start of the Piper's take-off and its point of no return.

3. There was, in any event, no occasion for the controllers to issue more than one warning on turbulence in the circumstances of this case.

a. The Manual merely provided that "[w]hen controllers foresee the possibility that departing . . . aircraft might encounter . . . wing tip vortices from preceding aircraft, cautionary information to that effect should be issued to pilots concerned." Manual, 411.7. In this case, Controller Humphreys issued such information to Shima, the pilot in command of the Piper, when he radioed the following message to him--"PIPER NINE NINE ZULU CAUTION TURBULENCE DEPARTING DC-8 CLEARED FOR TAKE-OFF." Shima apparently received Humphreys' transmission since he immediately executed his take-off clearance. Under these circumstances, there was nothing further the controllers could do to prevent Shima from disregarding the warning he had received and taking off "without waiting long enough for the wake turbulence to dissipate" (Slip Op., p. 3). For, as this Court has previously determined, Shima should have known of the danger to the Piper from the preceding DC-8's wake turbulence (Slip Op., pp. 4-6), and there is no evidence that he would have paid any more attention to a second warning than he did to the first. The Manual directed



the controllers to predicate clearances, instructions and information "solely upon observed or known traffic or airport conditions which in their judgment, may constitute collision hazards to aircraft." Manual, 411.1. And under the Civil Air Regulations, Shima alone was "directly responsible for" and had "final authority as to" the Piper operation. 14 C.F.R. 60.2 (1961 rev.).

b. Moreover, this Court overlooked the fact that there was at least one safe way for the Piper to take-off immediately after it received its clearance. At this airport, a usual practice of small airplanes on Runway 4-L to avoid the turbulence from large airplanes on Runway 8 was to roll through Runway 8 on the ground under the turbulence before lifting off and climbing out (Tr. 1332, 1338-1339, 1345-1346, 1348, 1351-1352). Controller Garcia was fully aware of this practice and testified that pilots of light aircraft such as the Piper "would keep the airplane low and roll out across the runway itself [Runway 8], and then start the climb-out"; "[t]hey wouldn't start to lift up until they crossed that runway" (Tr. 1041-1042). Thus, when he saw the Piper begin its take-off roll, he could only assume that its pilot was going to follow that safe method of taking off, and there was no occasion to issue a further warning. <sup>1/</sup>

1/ The district court determined that Controller Garcia should have done more than issue the warning (245 F. Supp. at 1011-1012). However, it is undisputed, as the district court found, that Garcia saw the Piper begin its take-off roll "and immediately thereafter" turned his attention elsewhere; he did not again see the Piper until it was caught up in the DC-8's turbulence (245 F. Supp. at 989-990; Tr. 342-344, 365, 978-979, 1069, 1077-1078). Hence, Garcia did not see the Piper disregard the warning by lifting off before reaching the Runway 8 intersection.

It is, indeed, doubtful whether any of the controllers had an opportunity to issue a second warning and whether such a warning might have prevented the accident. For the Piper encountered the C-8's turbulence in the vicinity of the tower and actually crashed some 1,000 feet from the place at which it started its take-off roll (45 F. Supp. at 990). Yet it probably rolled about 600-700 feet before lifting-off the ground and climbing out at 70-80 miles per hour (Tr. 282-283, 287, 289-290, 292-293).

In sum, this Court's decision has subjected the United States to liability on a theory of which it had no notice and which it had no opportunity to meet. In any event, the record here indicates that the United States was not negligent under that theory.

#### CONCLUSION

For the foregoing reasons, the petition for rehearing should be granted and the judgment of the district court against the United States should be reversed.

Respectfully submitted,

CARL EARDLEY,  
Acting Assistant Attorney General,

HERMAN T. F. LUM,  
United States Attorney,

ALAN S. ROSENTHAL,  
HOWARD J. KASHNER,  
Attorneys,  
Department of Justice,  
Washington, D.C. 20530.

SEPTEMBER 7, 1967



## CERTIFICATES

I hereby certify that, in my judgment, this petition for rehearing is well founded, and it is not interposed for delay.

I hereby certify that, in connection with the preparation of this petition for rehearing, I have examined Rules 19 and 23 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing petition is in full compliance with those rules.

Howard J. Kashner  
HOWARD J. KASHNER  
Attorney for Appellant United  
States of America  
Department of Justice,  
Washington, D.C. 20530.

## AFFIDAVIT OF SERVICE

I hereby certify that on this 7th day of September, 1967, five copies of the foregoing petition were served by airmail, special delivery, postage prepaid, on opposing counsel as follow

E. D. Crumpacker, Esquire  
P.O. Box 742  
Kailua, Kona, Hawaii 96740

Frank D. Padgett, Esquire  
Fourth Floor, Bishop Trust  
Building  
Honolulu, Hawaii 96813

Howard J. Kashner  
HOWARD J. KASHNER  
Attorney for Appellant United  
States of America  
Department of Justice,  
Washington, D.C. 20530.

[SEAL]

Subscribed and sworn to before me  
this 7th day of September, 1967.

Angeline Johnson  
NOTARY PUBLIC

No. 20662 ✓

See Vol. 3376

**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

ODELOH BROTHERS SWEED MILLS,  
INC., et al.,

*Appellants,*

v.

E MANUFACTURING COMPANY,  
a Corporation,

*Appellee,*

and

E MANUFACTURING COMPANY,  
a Corporation,

*Appellee and Cross-Appellant,*

v.

ODELOH BROTHERS SWEED MILLS,  
INC., et al.,

*Appellants and Cross-Appellees.*

*Appeal from the United States District Court for the  
District of Oregon—Civil No. 9702 (Judge Solomon)*

**ANSWER TO RESPONSE TO PETITION FOR REHEARING**

CKHORN, BLORE, KLARQUIST & SPARKMAN,  
NNETH S. KLARQUIST,

503 Board of Trade Building, Portland, Oregon 97204,

AUSE, LINDSAY & NAHSTOLL,

NTH F. KRAUSE,

9th Floor Loyalty Building, Portland, Oregon 97204,

TTS, HOFFMANN, FISHER & HEINKE,

IES T. HOFFMANN,

500 Union Commerce Building, Cleveland, Ohio 44115,

*Attorneys for Appellee and Cross Appellant.*

FILED

FEB 18 1957

W. B. LUCK, CLERK

8201357





## TABLE OF CASES

	Page
Allen v. Standard Crankshaft & Hydraulic Co., 323 F.2d 29 (CA 4, 1963) .....	4
Bulina et al, Application of, 362 F.2d 555 (CCPA, 1966) .....	1
Graham v. John Deere Co., 383 U.S. 1 .....	2, 3
Great A. & P. Tea Co. v. Supermarket Equipment Corp., 340 U.S. 147 (1950) .....	4
Lincoln Eng. Co. v. Stewart-Warner, 1938, 303 U.S. 545 .....	4
Menough, Application of, 323 F.2d 1011 (CCPA, 1963) .....	5
Petering and Fall, application of, 301 F.2d 676 (CCPA, 1962) .....	4
Schnitzer v. California Corrugated Culvert, 140 F.2d 275 (CA 9, 1944) .....	1
U. S. v. Adams, 383 U.S. 39 .....	1

## STATUTES

35 U.S.C. 103 .....	1, 4, 5
---------------------	---------



**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

---

EDDELOH BROTHERS SWEED MILLS,  
INC., et al.,  
v.  
JOE MANUFACTURING COMPANY,  
a Corporation,  
and  
JOE MANUFACTURING COMPANY,  
a Corporation,  
v.  
EDDELOH BROTHERS SWEED MILLS,  
INC., et al.,

*Appellants,*  
*Appellee,*  
*Appellee and Cross-Appellant,*  
*Appellants and Cross-Appellees.*

---

*Appeal from the United States District Court for the  
District of Oregon—Civil No. 9702 (Judge Solomon)*

---

**ANSWER TO RESPONSE TO PETITION FOR REHEARING**

---



TO: THE HONORABLE FREDERICK G. HAMLEY, M. OLIVER KOELSCH, Circuit Judges, and JAMES A. WALSH, District Judge:

Petitioner apologizes for the inadvertent errors appearing in the Petition. They do not, of course, in any way affect the contentions advanced.

### **ERROR IN CONSIDERATION OF PRIOR ART COMPELS RECONSIDERATION OF FINDING OF OBVIOUSNESS**

The Petition shows that Streeter does not show means "to accommodate variations in height at the source" (Opinion, p. 10), an assertion not denied in the Response.

The assertion in the Response that Parker's claims do not call for such means ignores the requirement in claims 5, 7 and 17 that the feed end is vertically movable, the only purpose of which movement is to enable accommodation to stack height. See, for example, the stated objects in Parker's specifications, column 1, lines 21-31. Claims are, of course, to be read in connection with the specification. *U. S. v. Adams*, 383 U.S. 39; *Schnitzer v. California Corrugated Culvert*, 140 F.2d 275 (CA 9, 1944).

A finding of obviousness must be supported by a correct understanding of the prior art. See Application of *Bulina et al*, 362 F.2d 555 (CCPA, 1966).

While a correct understanding of the prior art is necessary to a consideration of the contribution of Parker, we do not wish the essential question to be obscured and which is not whether by one way or another Parker's apparatus could be made by fitting together pieces of the prior art, but rather, *was the conception of Parker's combination obvious within the meaning of Sec. 103, and did this Court apply the proper criteria to determine this question?* We submit it did not.



## THE COURT ERRED IN DEMANDING TESTS NOT DETERMINATIVE OF OBVIOUSNESS

In *Graham v. John Deere*, 383 U.S. 1, the Supreme Court stated:

“Under § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background the obviousness or nonobviousness of the subject matter is determined. Such secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented. As indicia of obviousness or nonobviousness, these inquiries may have relevance. See Note, Subtests of ‘Nonobviousness,’ 112 Pa. L. Rev. 1169 (1964).”

The cited article reads in part as follows:

“Courts have difficulty in applying the broad standard of nonobviousness to technical facts. Subtests should be developed . . . based upon non-technical facts.<sup>20</sup> Some courts have developed and utilized such subtests, often termed ‘indicia of invention.’<sup>21</sup>” (P. 1172)

“<sup>21</sup> *Kaakinen vs. Peelers Co.*, 301 F.2d 170, 173 (9th Circuit), cert. denied 371 US 83 (1962); . . .”

We have already pointed out the error of this Court in determining the scope and content of the prior art and the differences between Parker and the prior art. Petitioner further submits that the Court also erred in its resolution of the level of ordinary skill in the art of handling veneer, and that

ed in its conclusion of what should be obvious to persons having such skill. The Supreme Court in *Grain Processing Co. v. Proctor* suggests "such secondary considerations as failure of others, etc. might be utilized" to answer the question. No tests of "different function" or "unusual or surprising" results are suggested. Significantly, the cited article to which the Supreme Court once referred discusses a number of considerations referred to therein as subtests but does not mention "different functions" or "unusual or surprising results." And how better can the level of the skill in the art be evaluated and what was obvious or unobvious to persons having ordinary skill in the art be determined than by such subtests, that is, long felt unsolved need, failure of others and the opinion of contemporaries working in the art such as the people who refused to even allow the Parker apparatus to be tested in their factories.

The observation of the Fourth Circuit is indeed relevant:

"In approaching the question of obviousness, however, judges should mistrust their subjective notions if there are objective indicia to guide their judgments. Though the answer after the event may appear simple, the Court should not convert its simplicity into obviousness in the face of hard proof of recognized need for the answer, of long, unsuccessful search for the answer by people of skill in the art, of recognition by the industry that the claimed invention was the answer, and of its prompt adoption with attendant commercial success. Even a substantial combination of some of such criteria ought to out-

weigh a judge's subjective convictions that if as skilled as he had really looked for the answer he immediately could have put his finger up to it." *Allen v. Standard Crankshaft & Hydraulic Co.*, 323 F.2d 29 (CA 4, 1963).

Sec. 103 establishes a single standard to be applied to *all* inventions. As observed by the Court of Customs and Patent Appeals in *Application of Petering et al.*, 301 F.2d 676 (1962):

" . . . Congress did not contemplate various degrees of obviousness in section 103."

This Court indicated in its opinion that, because the patent was one for a combination of mechanical elements, it relied heavily, if not exclusively, on the following factors as indicating the obviousness of Parker:

- (1) That none of the *individual* components perform any different function in the combination than they do out of it. (p. 9-10)
- (2) Nothing unusual or surprising was accomplished. (p. 10)

The Court's error resides in its demand that either or both of these tests be met as a *prerequisite* to a finding of unobviousness. No Supreme Court decision, including the *A & P*\* and the *Lincoln Engineering*\*\* decisions, so holds. *Graham*, in fact, rejects such tests.

Whether or not an element performs a new or different function in a combination is not determinative of whether the combining of the elements was obvious. *And whether the combining was obvious is the one and only test required under Sec. 103.*

To impose a requirement that a mechanical element perform some new or different function is

---

\* *A & P v. Supermarket*, 340 U.S. 147.

\*\* *Lincoln Engineering v. Stewart-Warner*, 303 U.S. 4

combination is not in accordance with the patent statutes or the case law of the Supreme Court, would be unconstitutional, and ignores the improbability, even possibility, that mechanical elements can so perform. The Court is respectfully referred to the observation of the Court of Customs and Patent Appeals *Application of Menough*, 323 F.2d 1011 (1963):

“Mechanical *elements* can do no more than contribute to the combination the mechanical functions of which they are inherently capable. The patentability of combinations has always depended on the unobviousness of the combination *per se*.”

The rejection of the “unusual or surprising result” test in *Graham* was discussed in the Petition, page 4. In addition, it should be pointed out the requirement of this test would make only *accidental* invention entitled to a patent. This is contrary to the last proviso of Sec. 103:

“Patentability should not be negated by the manner in which the invention was made.”

### CONCLUSION

The Court's holding of the Parker patent invalid based upon principles contrary to the holding of the Supreme Court in *Graham*, contrary to the statute, and unconstitutional. The requested rehearing should be granted because of the far reaching effect of the decision.

Respectfully submitted,

GUNTHER F. KRAUSE,  
KENNETH S. KLARQUIST,  
JAMES T. HOFFMANN,  
Attorneys for Coe Manufacturing Co.





N O. 2 0 6 6 8

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

COMELLO RAYMOND,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

---

EDWIN L. MILLER, JR.,  
United States Attorney,  
JOHN A. MITCHELL,  
Assistant U. S. Attorney,

325 West "F" Street,  
San Diego, California 92101

Attorneys for Appellee,  
United States of America.

FILED

JAN 13 1967

WM. B. LUCK, CLERK





N O. 2 0 6 6 8

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

COMELLO RAYMOND,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

---

EDWIN L. MILLER, JR. ,  
United States Attorney,  
JOHN A. MITCHELL,  
Assistant U.S. Attorney,

325 West "F" Street,  
San Diego, California 92101

Attorneys for Appellee,  
United States of America.



## TOPICAL INDEX

	<u>Page</u>
Table of Authorities	iii
I      STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING JURISDICTION.	1
II     STATUTES AND RULES INVOLVED	2
A.      STATUTES	2
B.      RULES	4
III    STATEMENT OF THE CASE	5
A.      QUESTIONS PRESENTED	5
B.      STATEMENT OF FACTS	6
IV    SUMMARY OF ARGUMENT	12
V    ARGUMENT	13
A.      THE TRIAL COURT DID NOT COMMIT ERROR IN ITS INSTRUCTIONS TO THE JURY.	13
1.      THE TRIAL COURT'S INSTRUCTIONS CONCERNING CERTAIN LANGUAGE IN THE INDICTMENT BEING CONSIDERED AS SURPLUS- AGE WAS NOT A VIOLATION OF THE APPELLANT'S CONSTITU- TIONAL RIGHTS.	15
2.      THE TRIAL COURT'S INSTRU- TION CONCERNING CERTAIN LANGUAGE IN THE INDICTMENT BEING CONSIDERED AS SURPLUS- AGE WAS NOT ERROR BECAUSE OF THE TIME IT WAS GIVEN; AND DID NOT ERRONEOUSLY EMPHASIZE EVIDENCE.	21
3.      THE TRIAL COURT DID NOT ERRONEOUSLY INSTRUCT THE JURY CONCERNING APPLICABLE NEVADA LAW.	21



	<u>Page</u>
4. THE TRIAL COURT DID NOT ERRONEOUSLY INSTRUCT THE JURY CONCERNING ENTRAP- MENT.	23
B. THE FACTS IN THIS CASE DO NOT SHOW ENTRAPMENT OF THE APPEL- LANT AS A MATTER OF LAW.	26
C. THE TRIAL COURT DID NOT COMMIT ERROR IN FAILING TO COMPEL LEE DALLAS TO NAME (1) THE INDIVIDUAL THAT INTRODUCED HER TO THE FBI AND (2) THE INDIVIDUAL THAT ASKED HER TO LOCATE TRACY.	28
VI CONCLUSION	33
CERTIFICATE	34





## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Ex Parte Bain (1887), 121 U.S. 1	20
Byrne v. United States (9 Cir. 1964), 327 F.2d 825	26
Caminetti v. United States (1966), 242 U.S. 470	22
Castle v. United States (5 Cir. 1961), 257 F.2d 657	20
Cromer v. United States (D.C. Cir. 1944), 142 F.2d 697	20
Edgerton v. United States (9 Cir. 1944), 143 F.2d 697	21
Ford v. United States (1927), 273 U.S. 593	20
Glasser v. United States (1942), 315 U.S. 60	26
Marsh v. United States (5 Cir. 1965), 344 F.2d 317	20
Rovario v. United States (1957), 353 U.S. 53	31
Sherman v. United States (1958), 356 U.S. 369	25, 28
Silva v. United States (9 Cir. 1954), 212 F.2d 320	25, 28
Soper v. United States (9 Cir. 1955), 220 F.2d 158	20
Stirone v. United States (1960), 361 U.S. 212	20
Torres v. United States (9 Cir. 1965), 353 F.2d 734	22
Trice v. United States (9 Cir. 1954), 211 F.2d 513	25, 28



Page

United States v. Spector (7 Cir. 1963), 326 F.2d 345	20
Vincent v. United States (8 Cir. 1964), 337 F.2d 891	20
Walker v. United States (9 Cir. 1962), 298 F.2d 217	15

Statutes

Nevada Statutes, §175.250	4, 22
Nevada Statutes, §201.300	3, 21, 22
Title 18, United States Code, §1952	1, 2
Title 18, United States Code, §1952(a)	2
Title 18, United States Code, §3231	2
Title 18, United States Code, §4208(a)(2)	2
Title 28, United States Code, §1291	2
Title 28, United States Code, §1294	2

Rules and Misc.

27 F.R.D. 39, 4.12	25, 28
Federal Rules of Criminal Procedure:	
Rule 30	5, 14, 15, 22, 23
Rules of United States Court of Appeals For the Ninth Circuit:	
Rule 18	22, 23
Rule 18(d)	4, 14





IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

COMELLO RAYMOND,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

I

STATEMENT OF THE PLEADINGS AND  
FACTS DISCLOSING JURISDICTION

On July 22, 1964, the Federal Grand Jury for the Southern District of California, Southern Division <sup>1/</sup>, returned a three-count indictment (No. 33221-SD) charging the defendant with violations of Title 18, United States Code, Section 1952 (use of facility in interstate commerce in aid of racketeering) [C. T. 2-4]. <sup>2/</sup>

On August 31, 1964, the defendant entered his plea of not

---

<sup>1/</sup> On September 19, 1966 the Southern Division became the Southern District of California by Act of Congress.

<sup>2/</sup> "C. T. " refers to Clerk's Transcript.



guilty to all Counts and on February 9, 1965, jury trial commenced before the Honorable James M. Carter. On February 11, 1965, the defendant was acquitted as to Counts One and Two and convicted as to Count Three [C. T. 18-20; R. T. 2]. <sup>3/</sup> On March 19, 1965, the defendant was sentenced on Count Three to a five year period of incarceration pursuant to the provisions of Title 18, United States Code, Section 4208(a)(2). A Notice of Appeal was filed on March 26, 1965 [C. T. 34-36].

The jurisdiction of the United States District Court for the Southern District of California, Southern Division, was based on Title 18, United States Code, Sections 1952 and 3231. The jurisdiction of the United States Court of Appeals for the Ninth Circuit is based on Title 28, United States Code, Sections 1291 and 1294.

## II

### STATUTES AND RULES INVOLVED

#### A. STATUTES

Title 18, United States Code, Section 1952(a) reads in pertinent part as follows:

"§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

"(a) Whoever travels in interstate or foreign

---

<sup>3/</sup> "R. T. " refers to Reporter's Transcript.



commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to . . . .

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in . . . [subparagraph (3)] . . . shall be fined not more than \$10,000 or imprisoned for not more than five years, or both.

"(b) As used in this section 'unlawful activity' means (1) any business enterprise involving . . . prostitution offenses in violation of the laws of the State in which they are committed or of the United States, . . . ."

Section 201.300 of the Nevada Statutes reads in pertinent part as follows:

"201.300 Pandering: Definition; punishment.

"Any person who:

"1. Shall induce, persuade, encourage, inveigle or entice a female person to become a prostitute; or . . . .

"2. By threats, violence, or by any device or scheme shall cause, induce, persuade, encourage, take, place, harbor, inveigle or entice, a female person to become an inmate of a house of prostitution, or assignation





place, or any place where prostitution is practiced encouraged or allowed; . . . .

"6. Shall receive, or give or agree to receive or give any money or thing of value for procuring or attempting to procure any female person to become a prostitute or to come into this state or leave this state for the purpose of prostitution, . . . ."

Section 175.250 of the Nevada Statutes reads in pertinent part as follows:

"175.250 Abortion; enticing female for prostitution: Corroboration of woman's testimony. Upon a trial for procuring or attempting to procure an abortion, or aiding or assisting therein, or for inveigling, enticing, or taking away any female of previous chaste character, for the purpose of prostitution, or aiding or assisting therein, the defendant shall not be convicted upon the testimony of the woman upon or with whom the offense shall have been committed, unless she is corroborated by other evidence. "

## B. RULES

---

Rule 18(d) of the Court of Appeals for the Ninth Circuit reads in pertinent part as follows:

"Rule 18, Briefs.



"(d) . . . When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or instructions refused, together with the grounds of the objections urged at the trial . . . ."

Rule 30, of the Federal Rules of Criminal Procedure reads in pertinent part as follows:

"Rule 30. Instructions

". . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict stating distinctly the matter to which he objects and the grounds of his objection. . . ."

### III

#### STATEMENT OF THE CASE

##### A. QUESTIONS PRESENTED

---

In order to avoid needless repetition, the appellee will analyze the propositions presented by the appellant's brief in the following order:

1. Did the Trial Court commit error in its instructions to the jury?
2. Do the facts in this case show entrapment of the



appellant as a matter of law?

3. Did the Trial Court commit error in failing to compel Lee Dallas to name (A) the individual that introduced her to the F. B. I. and (b) the individual that asked her to locate Tracy?

## B. STATEMENT OF FACTS

---

Lee Dallas, a widow with seven children, who had worked as a prostitute in San Diego, was contacted in early 1964 by a man who wanted her to locate a friend named Tracy (also called Shirley). This man, who was married with four children, had paid approximately \$2000 in hospital bills for Tracy and now wanted Lee Dallas to locate Tracy so that the debt could be repaid [R. T. 26, 48, 60-63].

During the last part of May or early June of 1964, Lee Dallas who resided in San Diego, was visiting in Las Vegas, Nevada, with her mother. In Las Vegas she attempted to locate Tracy and while staying at the Stardust Hotel she was told by a bellboy that she could locate Tracy by calling the defendant at his telephone number in Las Vegas [R. T. 26, 60-63].

On approximately June 11, 1964, Lee Dallas placed a telephone call in San Diego, California, to the defendant at the Tahiti Motel, Las Vegas, Nevada. The defendant was not available at that time but shortly afterward he called Lee Dallas collect in San Diego, California. She told the defendant that she was trying to locate a girl named Tracy or Shirley. The defendant told her that he would





have her call [R. T. 7-10, 27, 51, 53, 58; Exhibit Four].

A few days later Lee Dallas had another telephone conversation with the defendant. At this time the defendant asked if she was interested in coming to Las Vegas and working. He told her to call Shirley that afternoon and not to tell Shirley that they had talked [R. T. 10-12, 51].

Lee Dallas then called Shirley and told her she was looking for work and asked if she could help. Shirley told her that she could stay with her and the defendant. The defendant called Lee Dallas on the same afternoon from Las Vegas. The defendant told her that she could come up to Las Vegas and stay with Shirley and him in their apartment. When asked what he would do with two women, the defendant responded that he would do the same as he was doing with one. The defendant also inquired as to whether or not he would have to have her confined to her room. He told her to bring all of her clothes but that she could take them off when she arrived. When the defendant was informed that her car was broken down he told her where to get the car repaired and suggested that she pay the mechanics by allowing them to take it out in trade [R. T. 12-14, 51].

Special Agent H. Edgar Strahl of the Federal Bureau of Investigation customarily discussed current intelligence matters with Lt. Earl Cochran from the Vice Squad of the local police department in San Diego. In one of these discussions, it was mentioned that Lee Dallas might be of some aid to the Federal Bureau of Investigation regarding violations of federal law. There was an



inquiry pending regarding Lee Dallas by the Federal Bureau of Investigation but this inquiry did not relate to the defendant in this case [R. T. 104-105, 107-108, 111-112, 119-121].

Special Agent Strahl called Lee Dallas by phone and subsequently met her on June 7, 1964 at Oscar's Drive-In Restaurant in San Diego, California. This is the first time that Special Agent Strahl had met Lee Dallas. A discussion took place regarding prostitution in San Diego. During this discussion Special Agent Strahl learned of the prior conversations between Lee Dallas and the defendant. Lee Dallas agreed to abide by any instructions or any encouragement concerning travel that she received from the defendant. It was further agreed that actual prostitution would be the point at which she would separate from the defendant [R. T. 59, 103-104, 106-108, 110, 112].

On June 18, 1964, Special Agent Strahl and another Special Agent went to the residence of Lee Dallas in San Diego. They knocked on the door and were admitted by Lee Dallas who was using her telephone. At her request Special Agent Strahl picked up an extension and listened to the conversation. This conversation began shortly before the Special Agents arrived as a result of the defendant calling Lee Dallas from Las Vegas. The defendant asked Lee Dallas to come to Las Vegas immediately and she said she would come real soon. The defendant asked her to come today. The defendant told her to bring all of her clothes and Lee Dallas said that she would have to have her clothes to wear. The defendant told her that she could take her clothes off when she got to Las



Vegas. Lee Dallas told the defendant that her car was acting up and he told her where to take the car for repairs and that she could take the cost of repairs out in service. The defendant told Lee Dallas that she could stay with Shirley and the defendant in their apartment. She asked what he would do with two women and he said the same as he was doing with one. The defendant also asked her whether or not he would have to have someone watching her to keep her in her room. The defendant also asked whether or not she was "chippyng" around on him and stepping out. The defendant asked Lee Dallas whether or not she would rather wait until the 27th to come to Las Vegas but she said she would come at the earliest possible date. He suggested that she contact Shirley by phone but told her not to mention their conversation [R. T. 10-14, 16-18, 51, 100-102, 110-112, 114].

On June 19, 1964, the defendant in the early afternoon, called Lee Dallas from Las Vegas. <sup>4/</sup> They discussed the fact that her car was broken down and she still had been unable to get it repaired; the fact that she was drawing unemployment; whether or not she had been "chippyng" on him; the fact that the defendant had a great deal of business and he had to call another girl to take care of it; the fact that she would pose as the sister-in-law of Tracy in Las Vegas; whether or not Lee Dallas would be the cause of a quarrel between the three of them when they were together; whether

---

<sup>4/</sup> This telephone call was taped by Special Agents of the FBI with the permission of Lee Dallas [R. T. 19-21, 29, 31-32, 34-35, 112-114; Exhibits One and Eleven].





or not the defendant would have to confine her; a general discussion concerning the hours she would be required to work; that she was going to be his "old lady"; <sup>5/</sup> that the defendant was going to do the same thing with two women that he did with one; a prior prostitution experience of Lee Dallas; how she was to handle Tracy; and when she was to arrive in Las Vegas. The defendant suggested that she call Tracy and tell her that she was now part of the family. The call was concluded by the defendant telling his "honey" to "hurry" to Las Vegas [R. T. 19-21, 29, 31-32, 34-35, 77-78, 112-114; Exhibits One, Five and Eleven].

Subsequent to this call, a friend rented a car for Lee Dallas so that she could make the trip to Las Vegas. Lee Dallas had agreed to cooperate with the FBI in order to make a positive identification of the defendant [R. T. 43, 109].

On June 23, 1964, Lee Dallas who had traveled from San Diego to Las Vegas, met at approximately 8:30 a.m. with Special Agents of the Federal Bureau of Investigation at the Fremont Hotel. A short conversation took place and it was agreed that they would meet at the Fremont Hotel again at 2:45 p.m. [R. T. 90-91].

At approximately 2:45 p.m. the Special Agents again met with Lee Dallas. She placed a phone call to the defendant and told him that she was outside of Las Vegas. The defendant told her to drive to the Tahiti Motel in Las Vegas and gave her directions

---

<sup>5/</sup> In the language of the street "old lady" means a woman that a man is using to make money for him by prostitution [R. T. 41].



R. T. 45-46, 51, 90-92].

Lee Dallas drove to the Tahiti Motel and parked the car. The defendant came out of the motel and got into her car. They talked for a few minutes, then they went into the motel office. The defendant told her to register and she did using an assumed name. She was told by the defendant that she would not have to pay for her room. While in the motel office she was introduced to Bert and Sue. It was disclosed that Sue was a prostitute and Bert was a clerk who also took phone calls making appointments [R. T. 46-47, 93-95, 98].

After remaining in the office for five or six minutes the defendant and Lee Dallas came out of the office and drove to the rear of the motel. They went into Room 129. At this time the defendant explained his operation. He said that he would make dates for her and that the dates were to be taken to Room 129 or she could go to the customer's rooms. The charge was twenty dollars and up for the dates. Lee Dallas was told to give him all of the money that she received and that he would furnish her with incidentals. Lee Dallas, at the defendant's request, disrobed and put on a bathing suit. The defendant told her that she would do. The defendant then carried a lounge chair into her room and Lee Dallas carried her clothes from her car into her room [R. T. 47-50, 95, 98].

The defendant left and approximately thirty minutes later returned with Tracy. They again discussed the operation and the defendant asked Lee Dallas whether or not she took part in abnormal sexual activities with men and women. Lee Dallas said that she



ot but Tracy and the defendant told her they would teach her and  
hat she would enjoy it. Lee Dallas was also told that she was re-  
quired to check out with them or with the desk clerk [R. T. 47-50,  
5, 98].

The defendant and Tracy left and Lee Dallas stayed in her  
room for two or three hours. Then the defendant called and told  
her that he would be by around three in the morning to try her out.  
Shortly after the phone call, Lee Dallas left the motel, met with  
Special Agents of the FBI, gambled for a while, and then returned  
to San Diego [R. T. 50-52, 96].

Some time after Lee Dallas had returned from Las Vegas  
he was again contacted by Special Agents of the FBI and paid \$50  
for expenses [R. T. 44, 57].

#### IV

#### SUMMARY OF ARGUMENT

The Honorable James M. Carter did not commit error in the  
jury instructions. The jury was properly instructed concerning  
surplusage in the Indictment and these instructions did not errone-  
ously emphasize any evidence. The jury was properly instructed  
concerning applicable Nevada law. The Trial Court properly in-  
structed the jury concerning the defense of entrapment.

The facts in this case clearly reveal that the appellant was  
not entrapped by federal officials or anyone else.

Finally there is no indication in this record of any valid





reason to require that Lee Dallas name the individual that directly or indirectly introduced her to the FBI and the individual who asked her to locate Tracy.

V

ARGUMENT

A. THE TRIAL COURT DID NOT COMMIT  
ERROR IN ITS INSTRUCTIONS TO THE  
JURY.

---

On February 10, 1965, jury instructions were discussed in the Trial Court's chambers. At that time counsel for the appellant did not indicate any objections to the instructions to be given [R. T. 130-143]. On February 11, 1965, jury instructions were again discussed in the chambers of the Trial Court. At this time, though the record is not clear, counsel for the appellant objected generally to the instruction concerning surplusage in the Indictment [R. T. 186-188]. Following the jury instructions, counsel for the appellant incorporated the prior objection and made a further objection to the surplusage instruction [R. T. 213-214].

A juror then addressed a question regarding Nevada law to the Trial Court and the Trial Court again explained Nevada law. Counsel for the appellant made no further objection and stated that he thought the Trial Court's statement was very good [R. T. 214-215].

The appellant now contends that the Honorable James M.



Carter committed error in his charge of the jury.

Rule 18(d) of the Rules of the United States Court of Appeals for the Ninth Circuit reads in pertinent part as follows:

"Rule 18(d) Briefs.

"(d) . . . when the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions refused, together with the grounds of the objections urged at the trial . . . ." [Emphasis added].

In light of the foregoing rule, the Government respectfully suggests that the error urged relating to the instructions of the Trial Court has not been properly raised for this Court's consideration.

In addition, Rule 30 of the Federal Rules of Criminal Procedure reads, in pertinent part, as follows:

"Rule 30. Instructions

" . . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. . . ."

The only objection which may have complied with Rule 30, though that is questionable, is the general objection to the surplusage instruction. The trial record is barren of any other objection made



by the appellant to the instructions of the Trial Court.

The Government respectfully submits that Rule 30, if strictly interpreted, precludes this Court from considering the error alleged by the appellant as to the instructions of the Trial Court.

If Rule 30 is not strictly interpreted, then the case of Walker v. United States (9 Cir. 1962), 298 F.2d 217, must be considered.

In the Walker case it was stated that:

"Having failed to comply with Rule 30, not contending that plain error had been committed, and because the instructions taken as a whole and read together do not appear prejudicial, the appellants are barred from presenting this issue on appeal." (p. 225).

This Court in reviewing the error alleged as to the instructions of the Trial Court, must determine whether or not the instructions taken as a whole and read together are prejudicial.

1. The Trial Court's instructions concerning certain language in the Indictment being considered as surplusage was not a violation of the appellant's constitutional rights.

The appellant contends that the Trial Court violated his constitutional rights by instructing the jury that they may ignore the language "of prostitution" in Count Three of the Indictment.

Count Three of the Indictment reads as follows:

"On or about June 18, 1964, defendant CAMELLO RAYMOND did use a facility in interstate commerce, to wit, a telephone line from Las Vegas, Nevada to San Diego, California, within the Southern Division of





the Southern District of California, with the intent to promote, carry on, and facilitate the promotion and carrying on of prostitution, unlawful activity and thereafter attempted to perform the promotion and carrying on of prostitution, in violation of the laws of Nevada. "[C. T. 4; emphasis added].

The Trial Court instructed the jury, in part, that:

" . . . I will first read the counts of the Indictment as they stand, and subsequently I have another instruction in which I state to you that you may disregard two words in each of the counts as being surplusage. But at this time I will read the counts of the Indictment as they appear. I am not amending the Indictment. No Indictment can be amended. However, the Court may instruct the jury that it may disregard certain words as being surplusage. . . . " [R. T. 196-197].

After further general instructions the Trial Court then instructed the jury that:

" . . . Section 201.300 of the Laws of Nevada provides:  
Any person who shall induce, persuade, encourage, inveigle or entice a female person to become a prostitute, or by any device or scheme shall induce, persuade, encourage or entice a female person to become an inmate of a house of prostitution or assignation place or any place where prostitution is practiced, encouraged,



or allowed, or a person who shall agree to receive or give any money or thing of value for attempting to procure any female person to become a prostitute or to come into this state for the purpose of prostitution, shall be guilty of an offense.

"Now, having in mind that there is no prohibition against prostitution in Nevada but that there are statutes regulating it, we come back to the indictment in the case and you will note that each count charges the use of an interstate facility, a telephone line, with the intent to promote, carry on and facilitate the promotion and carrying on of prostitution, an unlawful activity. The Court now instructs you that you may disregard those two words 'of prostitution' in that part of the Indictment as being surplusage. They appear on line 25 of Count One, and to point them out I will, with a pencil, put parentheses around them. They appear in Count Two on line 8. All the counts, of course, are in similar language, except for the date. And those words appear on Line 8 of Count Three. So if you decide to disregard those two words as being surplusage, then the Indictment charges the use of a telephone facility with the intent to promote, carry on and facilitate the promotion and carrying on of an unlawful activity, and thereafter attempted to perform the promotion and carrying on of prostitution,



in violation of the Laws of Nevada.

"So, as read, if you decide to disregard the two words I have pointed out as being surplusage, each count in the Indictment refers to attempting to perform promotion and carrying on of an unlawful activity, and that the defendant thereafter attempted to perform the promotion and carrying on of prostitution, in violation of the laws of Nevada, and not merely the bald statement of promoting prostitution. This may sound like a distinction without a difference. But if the defendant is charged with merely promoting the carrying on of prostitution, there is nothing illegal in carrying on prostitution in Nevada. But if he is charged with carrying on the performing of prostitution contrary to the laws of Nevada, then knowing that Nevada says prostitution is legal but that it must be carried on in certain ways and that certain things may not be done, then the Indictment refers to this matter of performing and carrying on prostitution in violation of the laws of Nevada . . . that is, in a way that Nevada has prohibited.

"I don't know whether I have made myself clear or not. You will have the Indictment with you, and I am merely instructing you, not that you must, but that you may disregard the two words 'of prostitution' where they first appear in each count, which I have





noted with a pencil mark. Now the same words appear  
later on in the Indictment, but where they appear later  
they are followed by the words 'in violation of the laws  
of Nevada. ' Each count later on refers to carrying on  
prostitution, but is then followed by the language 'in  
violation of the laws of Nevada. ' [R. T. 201-203;  
emphasis added].

In response to a juror's question the Trial Court stated that:

" . . . THE COURT: I told you that prostitution may go on in Nevada, but I read you the laws of Nevada, which provide -- I am not going to re-read them to you, but which provided that certain things might not be done with reference to persuading or enticing women to become prostitutes. In other words, if you could summarize it in a word or two, Nevada has said prostitution is legal, but they have passed a whole series of laws about how women may or may not become prostitutes and what people may do to entice or persuade them to enter a house of prostitution. So if there is any violation of the laws of Nevada, it is not the carrying on of prostitution. It is the question whether or not any person was enticed or persuaded to become a prostitute, or whether or not there was an agreement to give or to receive money to procure a female to become a prostitute or to come



into the state. " [R. T. 215].

It is fundamental that a Trial Court cannot amend an indictment and cause a defendant to be tried on a charge which was not originally indicted. Ex Parte Bain (1887), 121 U.S. 1; and Stirone v. United States (1960), 361 U.S. 212. It has also been held that part of the indictment which is surplusage may be rejected and ignored as a useless, innocuous averment without constituting an amendment to the indictment. Ford v. United States (1927), 273 U.S. 593. 6/

The issue before this Court is whether or not the Trial Court amended the indictment or in the alternative instructed the jury to ignore surplusage.

When Count Three of the Indictment is analyzed it is clear that the language "of prostitution" was surplusage. When that language is stricken all of the elements of the offense are charged clearly and concisely. "Of prostitution" was unnecessary and superfluous.

---

/ See also: Marsh v. United States (5 Cir. 1965), 344 F.2d 317; Vincent v. United States (8 Cir. 1964), 337 F.2d 891; United States v. Spector (7 Cir. 1963), 326 F.2d 345; Castle v. United States (5 Cir. 1961), 257 F.2d 657; Soper v. United States (9 Cir. 1955), 220 F.2d 158; and Cromer v. United States (D.C. Cir. 1944), 142 F.2d 697.



2. THE TRIAL COURT'S INSTRUCTION CONCERNING CERTAIN LANGUAGE IN THE INDICTMENT BEING CONSIDERED AS SURPLUSAGE WAS NOT ERROR BECAUSE OF THE TIME IT WAS GIVEN; AND DID NOT ERRONEOUSLY EMPHASIZE EVIDENCE.

---

Counsel for the appellant further contends that the Trial Court's instruction concerning the words "of prostitution", in Count Three of the Indictment was error because of the time it was given and because it erroneously emphasized certain evidence.

There is no showing in this case that the Trial Court's jury instructions striking out surplusage in any way emphasized evidence of any kind to the detriment of the appellant.

Edgerton v. United States (9 Cir. 1944) , 143 F.2d 697 is not applicable. Two of the judges clearly limited their opinions to the surplusage aspect of the case, and did not concur in that portion of the opinion concerning the effect of the time when the surplusage was stricken.

3. THE TRIAL COURT DID NOT ERRONEOUSLY INSTRUCT THE JURY CONCERNING APPLICABLE NEVADA LAW.

---

The appellant now contends, for the first time, that the Trial Court erred in (A) failing to interpret Section 201.300 of the Nevada Statutes and (B) failing to require that the testimony of Lee





Dallas be corroborated pursuant to Section 175.250 of the Nevada Statutes.

The Trial Court in chambers discussed with counsel the applicability of Nevada Law and in particular Section 201.300. No objection to the instructions concerning Nevada Laws were made by experienced counsel representing the appellant [R. T. 130-144, 14]. The provisions of Rule 18 of this Court and Rule 30 of the Federal Rules of Criminal Procedure preclude consideration of this alleged error.

Notwithstanding the foregoing analysis it is clear that the Trial Court was not required to go into detail concerning Section 201.300 while instructing the jury. This statute is clear on its face and the jury properly decided that the appellant violated the statute.

Nevada Revised Statute 175.250 was not applicable to this case. State procedural rules concerning corroboration of an accomplice do not apply in Federal Court. Caminetti v. United States (1966), 242 U.S. 470; and Torres v. United States (9 Cir. 1965), 353 F.2d 734.

It is clear that Section 175.250 applies only to a fact situation concerning a defendant who inveigles, entices, or takes away a woman of chaste character for the purpose of prostitution. This particular crime is charged in a separate paragraph in Section 201.300 of the Nevada Statutes and was not one of the Nevada crimes that the Trial Court in our case presented to the jury. Therefore, even in Nevada, Section 175.250 is not applicable where the violation alleged relates to paragraphs one, two and six of Section 201.300.



In any event, the record in this case shows that the testimony of Lee Dallas was corroborated by the testimony of the Special Agents of the Federal Bureau of Investigation and the tape recording concerning the telephone conversations of June 19, 1964.

The Government respectfully submits that the Trial Court properly instructed the jury concerning the law of the State of Nevada.

4. THE TRIAL COURT DID NOT  
ERRONEOUSLY INSTRUCT THE  
JURY CONCERNING ENTRAP-  
MENT.

---

Again, for the first time, counsel for the appellant presents the contention that the Trial Court committed error in the jury instructions concerning entrapment. No objection was made and pursuant to the provisions of Rule 18 of this Court and Rule 30 of the Federal Rules of Criminal Procedure, this contention should not be considered by this Court.

If this Court does decide to consider this contention then the instructions given by the Trial Court and the applicable case law must be analyzed.

The Trial Court instructed the jury regarding entrapment as follows:

"The Defense has raised the defense of entrapment. The law recognizes two kinds of entrapment -- unlawful entrapment, and lawful entrapment. Where



a person has no previous intent or purpose to violate the law but is induced or persuaded by law-enforcement officers to commit a crime, he is entrapped; he is entitled to the defense of entrapment, unlawful entrapment, because the law, as a matter of policy, forbids the conviction in such case. On the other hand, where a person has already the readiness and willingness to break the law, the mere fact that Government agents provide what appears to be a favorable opportunity is no defense, for this is lawful entrapment.

"If, then, the Jury find from the evidence that before anything at all occurred respecting the alleged offenses involved in this case the accused was ready and willing to commit crimes such as those charged in the Indictment whenever opportunity offered, and the Government merely offered the opportunity, the accused is not entitled to the defense of unlawful entrapment. If, on the other hand, the Jury should find that the accused had no previous intent or purpose to commit any offense of the character here charged and did so only because he was induced or persuaded by some agent of the Government, then the prosecution has seduced an innocent person and the defense of unlawful entrapment is a good defense and the Jury should acquit the accused.

"Now the evidence shows -- and you are the





sole judges of the evidence, but the evidence shows that the FBI entered this case on or about June 17th. You are the finders of fact. I am merely telling you what I think the evidence shows. Therefore, the defense of entrapment, if it is good at all, would only be good as to charges that concerned activities of the defendant after the date that the Agents entered the case and would not be an available defense to offenses that occurred before there was any contact by the Agents with any of the parties in this case. " [R. T. 203-204]

The instruction given by the Trial Court in form and in substance has been approved time and time again by this and other Federal Courts. Sherman v. United States, (1958), 356 US 69; Silva v. United States, (9 Cir. 1954), 212 F.2d 320; Trice v. United States (9 Cir. 1954), 211 F.2d 513; and 27 F.R.D. 39, 12.

The Government respectfully submits that the Trial Court's instruction with respect to entrapment was not error.



B. THE FACTS IN THIS CASE DO NOT  
SHOW ENTRAPMENT OF THE APPELLANT AS A MATTER OF LAW.

---

Counsel for the appellant contends that the facts in this case show that the appellant was entrapped as a matter of law.

As indicated by the "Statement of Facts", the evidence when viewed in the light most favorable to the Government <sup>7/</sup> shows that Lee Dallas was contacted in early 1964 by a man who wanted her to locate a friend named Tracy (Shirley) in order that he might collect \$2000 that was due and owing. Lee Dallas while in Las Vegas visiting with her mother obtained the appellant's phone number in Las Vegas who would know the location of Tracy (Shirley). Subsequently, Lee Dallas contacted the appellant in Las Vegas on or about June 11, 1964, attempting to locate Tracy (Shirley).

The Federal Bureau of Investigation came into this case when Special Agent Strahl contacted Lee Dallas on or about June 17, 1964. At this meeting Lee Dallas mentioned for the first time prior telephone discussions with the appellant. The record clearly indicates that the Special Agent did not contact Lee Dallas regarding the appellant but rather his name came up in the first discussion for the first time.

The record also indicates that prior to the first meeting

---

<sup>7/</sup> At this stage in the proceedings, the evidence must be viewed in the light most favorable to the United States. Glasser v. United States (1942), 315 U.S. 60, and Byrne v. United States (9 Cir. 1964), 327 F.2d 825.



with Special Agents, the appellant had asked Lee Dallas to come to Las Vegas and work and had told Lee Dallas that she could stay with Shirley and him, that he would do the same thing with two women that he was doing with one, that he wished to know whether or not she had to be confined, that she should bring all of her clothes with her and that she could pay for necessary repairs to her vehicle by servicing the mechanics. Obviously the appellant wanted Lee Dallas to work for him as a prostitute.

Subsequent to the first meeting, Special Agents on or about June 18, 1964, overheard part of a telephone conversation between the appellant and Lee Dallas and on June 19, 1964, taped a telephone conversation between the appellant and Lee Dallas. The two conversations clearly indicate that the appellant wished Lee Dallas to come to Las Vegas and work for him as a prostitute. This conclusion is clearly substantiated by the tape recording and the subsequent Las Vegas activity.

It must be noted that there is no indication in this record that the person who asked Lee Dallas to locate Tracy (Shirley) is the same person who, directly or indirectly, introduced her to Special Agents of the Federal Bureau of Investigation. This record clearly shows that Lee Dallas first came to the attention of Special Agents of the FBI as a result of information provided by an officer of the local vice squad.

There can be no doubt in this case that the appellant had prior intent and purpose to violate the law. Further, the appellant was not induced or persuaded by law enforcement officers to





commit a crime. Not only did the appellant have the readiness and willingness to break the law, he already had violated the law when Special Agents of the Federal Bureau of Investigation were informed of his telephone conversation with Lee Dallas.

Federal officers may have provided a favorable opportunity but they clearly did not induce or persuade the appellant, who was pimping for at least one woman, to commit a crime. Sherman v. United States (1958), 356 U.S. 369; Silva v. United States (9 Cir. 1954), 212 F.2d 422; Trice v. United States (9 Cir. 1954), 211 F.2d 513; and 27 F.R.D. 39, 4.12.

C. THE TRIAL COURT DID NOT COMMIT ERROR IN FAILING TO COMPEL LEE DALLAS TO NAME (1) THE INDIVIDUAL THAT INTRODUCED HER TO THE FBI AND (2) THE INDIVIDUAL THAT ASKED HER TO LOCATE TRACY.

---

Counsel for the appellant contends that the Trial Court erred in failing to compel Lee Dallas to disclose the identity of a source of information.

At the Trial, Counsel for the appellant, regarding foundation for the tape recording, examined Lee Dallas on voir dire [R. T. 22-30] and in pertinent part the following occurred:

"BY MR. WHELAN:

"Q. When did you first meet these FBI agents?

"A. Sometime in June. I don't know the exact date.



"Q. What is your best approximation?

"A. Around the 15th.

"Q. Do you think you met them around the 15th?

"A. Yes.

"Q. How did you happen to meet them?

"A. Through a personal friend of mine.

"Q. Through a what?

"A. A personal friend of mine.

"Q. What was his name?

"A. I would rather not say.

"Q. Was it Malley Cornell?

"A. I would rather not answer.

"Q. What's that?

"A. I would rather not answer names.

"MR. WHELAN: I think, if the Court please, she is required to answer.

"MR. SIROTA: I don't believe so, your Honor. There is no sense bringing in people not connected with this. They have a reputation in the community.

"THE COURT: Unless you can make some showing as to why it would be material, I will sustain the objection, without prejudice to further inquiry." [R. T. 22-23]

At a later point in the trial, counsel for the appellant asked the following questions, during cross examination of Lee Dallas, and received the following answers:



"Q. But who is the man that originally asked you to find Tracy?

"A. I don't want to say. He has no connection with this whatsoever. He only wanted to find her to get his money back.

"MR. SIROTA: At this time what Tracy has to do with this case I don't know. It doesn't seem to be very relevant, the questions Mr. Whelan is asking the witness.

"THE COURT: Proceed.

"BY MR. WHELAN:

"Q. I would like to ask a question as to the identity of this gentleman who apparently put the wheels in motion which has resulted in what we are confronted with here now.

"A. This was not the purpose of the man at all. He knew nothing about Ray Carmello.

"MR. WHELAN: I move to strike that voluntary statement of the witness.

"THE COURT: It may go out. But your objection will be overruled at this time, without prejudice to being renewed, if you can lay some proper foundation as to why it should be necessary to reveal this man.

"MR. WHELAN: You mean my question will not be permitted at this time?

"THE COURT: Maybe I didn't say it right.

"MR. WHELAN: You said my objection would be





overruled, and I was not objecting -- I was asking.

"THE COURT: The question will not be -- I will not force the witness to answer the question at this time, without prejudice to a renewal of your request."

[R. T. 63-64]

The foregoing testimony, first on voir dire and then on cross examination, indicates that an individual introduced her to the FBI, whether directly or indirectly we do not know; and an individual asked her to locate Tracy for him. There is no indication in this record that we are dealing with the same person. There is no indication that counsel for the appellant did not know the name of the individual or individuals.

Further the record clearly indicates that the Trial Court would have allowed the questions to be answered if there had been a proper showing by experienced counsel representing the appellant. No showing was made, no offer of proof was presented and there is nothing in this record to indicate the necessity of dragging the names of innocent people before the public in a trial such as this.

When Special Agents of the Federal Bureau of Investigation contacted Lee Dallas, they contacted her on another matter. It was only during the first conversation that the appellant's name was first mentioned. Thus the only informant in this case was Lee Dallas. No other individual or individuals could be classified as an informant.

In the case of Rovario v. United States (1957), 353 U.S. 53,



the guidelines concerning the disclosure and non-disclosure of an informant's identity are presented. That case recognized that in the public interest it is sometimes necessary to conceal the name of an informant. The privilege is not applicable where the identity has once been revealed. The privilege will not apply where it is essential to a fair determination of a case. The important rule has always been that the privilege will not apply where the informant set up the commission of the crime and was present when the crime occurred.

It is clear in this case that the individual who introduced Lee Dallas to the Federal Bureau of Investigation, either directly or indirectly, was not an informant, did not set up the commission of the crime we are dealing with here, and was not present when the crime occurred. A fair determination of this case does not require that the individual's name, which may have been known to counsel for the appellant, be released.

A similar conclusion must be reached when dealing with the name of the individual who asked Lee Dallas to locate Tracy. He did not set up the commission of the crime, was not present when the crime took place, and a fair determination of this case does not require that his infidelity be made a matter of public record in San Diego.

The Government respectfully submits that this record indicates no reasonable basis whereby the names of these individuals should have been revealed in this case.



VI

CONCLUSION

The Government respectfully submits that the conviction of the appellant should be affirmed.

Respectfully submitted,

EDWIN L. MILLER, JR.,  
United States Attorney,

JOHN A. MITCHELL,  
Assistant United States Attorney,

Attorneys for Appellee,  
United States of America.





## CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ John A. Mitchell

JOHN A. MITCHELL  
Assistant United States Attorney



*See Vol. 3201*

---

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

ROBERT E. McCARTHY, Successor to WALTER E. BECK,  
as Manager of the United States Land Office at  
Sacramento, California,

Appellant

v.

LEONARD E. NOREN AND HARRY C. PERRY,

Appellees

---

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA,  
NORTHERN DIVISION

---

APPELLANT'S RESPONSE TO PETITION FOR REHEARING

---

EDWIN L. WEISL, JR.,  
Assistant Attorney General.

JOHN K. VAN DE KAMP,  
United States Attorney,  
Los Angeles, California, 90012.

RICHARD J. DAUBER,  
Assistant United States Attorney,  
Los Angeles, California, 90012.

ROGER P. MARQUIS,  
GEORGE R. HYDE,  
Attorneys, Department of Justice,  
Washington, D. C., 20530.

---

---

FILED

2067



IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

No. 20671

ROBERT E. McCARTHY, Successor to WALTER E. BECK,  
as Manager of the United States Land Office at  
Sacramento, California,

Appellant

v.

LEONARD E. NOREN AND HARRY C. PERRY,

Appellees

---

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA,  
NORTHERN DIVISION

---

APPELLANT'S RESPONSE TO PETITION FOR REHEARING

---

This reply brief is limited to the single question specified by this Court, as contained in the letter of the clerk of this Court dated January 6, 1967; that is, whether the order appealed from is an appealable order.

THE ORDER APPEALED FROM WAS A FINAL  
APPEALABLE ORDER

The petition implies that this jurisdictional issue is raised for the first time by the petition. This is not true.

Prior to briefing on the merits, appellees moved to dismiss the appeal on the grounds now urged. After argument, this motion was denied by order of February 9, 1966. Aside from stare decisis, this order was, we submit, plainly correct.

Appellees are arguing that, since the matter was remanded for further proceedings within the Department of the Interior, the Court's order is not a final order. But the issue is whether the remand was proper. The judgment was certainly final as to that. The position of the appellant is that the district court erred in ordering the case remanded for the holding of a hearing. The order of remand entered in this case would have required the Land Office Manager to adopt a procedure which is contrary to many years of administrative practice within the Department of the Interior. The order of remand was not entered for the purpose of giving "an administrative body an opportunity to meet objections to its order by correcting irregularities in procedure, or supplying deficiencies in its records, or making additional findings where these are necessary, or supplying findings validly made in the place of those attacked as invalid." Ford Motor Co. v. Labor Board, 305 U.S. 364, 375



(1939). On the contrary, the order appealed from would have returned this matter to the Manager of the Land Office at Sacramento for the conducting of an adversary type hearing which is not required by any statute, regulation or departmental order. The correctness of the district court's order, which involves only a legal issue, would not have been affected in any way by hearings conducted under the remand.

The authorities and points presented by the appellees in support of their petition for rehearing have no relevance to the basic issue presented by this appeal. Ford Motor Co. v. Labor Board, 305 U.S. 364 (1939), holds simply that an administrative agency may request the return of a case to it to permit additional evidence to be taken, new findings to be made, or to permit some defect in the record to be supplied.

Appellees' argument proves too much. It would mean that an administrative agency could never seek appellate review of a district court holding that, in some respect, the administrative proceedings were invalid. So far as this mandamus case is concerned, the judgment of remand ends the case. In fact, because of optional venue, a further review after remand

might be in another court in another circuit.

Moreover, if appellees are right and the judgment does not determine anything with finality, the administrative authorities believing the decision to be wrong and having no right to review it, may ignore it. The absurdity of such result is apparent.

#### CONCLUSION

The order appealed from was clearly an appealable order.

Respectfully submitted,

EDWIN L. WEISL, JR.,  
Assistant Attorney General.

JOHN K. VAN DE KAMP,  
United States Attorney,  
Los Angeles, California, 90013

RICHARD J. DAUBER,  
Assistant United States Attorney  
Los Angeles, California, 90013

ROGER P. MARQUIS,  
GEORGE R. HYDE,  
Attorneys, Department of Justice  
Washington, D. C., 20530.

JANUARY 1967.

N O. 2 0 6 7 6

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

CALIXTO RODRIGUEZ-GONZALEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

---

EDWIN L. MILLER, JR.,  
United States Attorney,  
PHILLIP W. JOHNSON,  
Assistant U. S. Attorney,

325 West "F" Street,  
San Diego, California 92101,

Attorneys for Appellee,  
United States of America.

FILED

INT

CLERK



N O. 2 0 6 7 6

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

CALIXTO RODRIGUEZ-GONZALEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

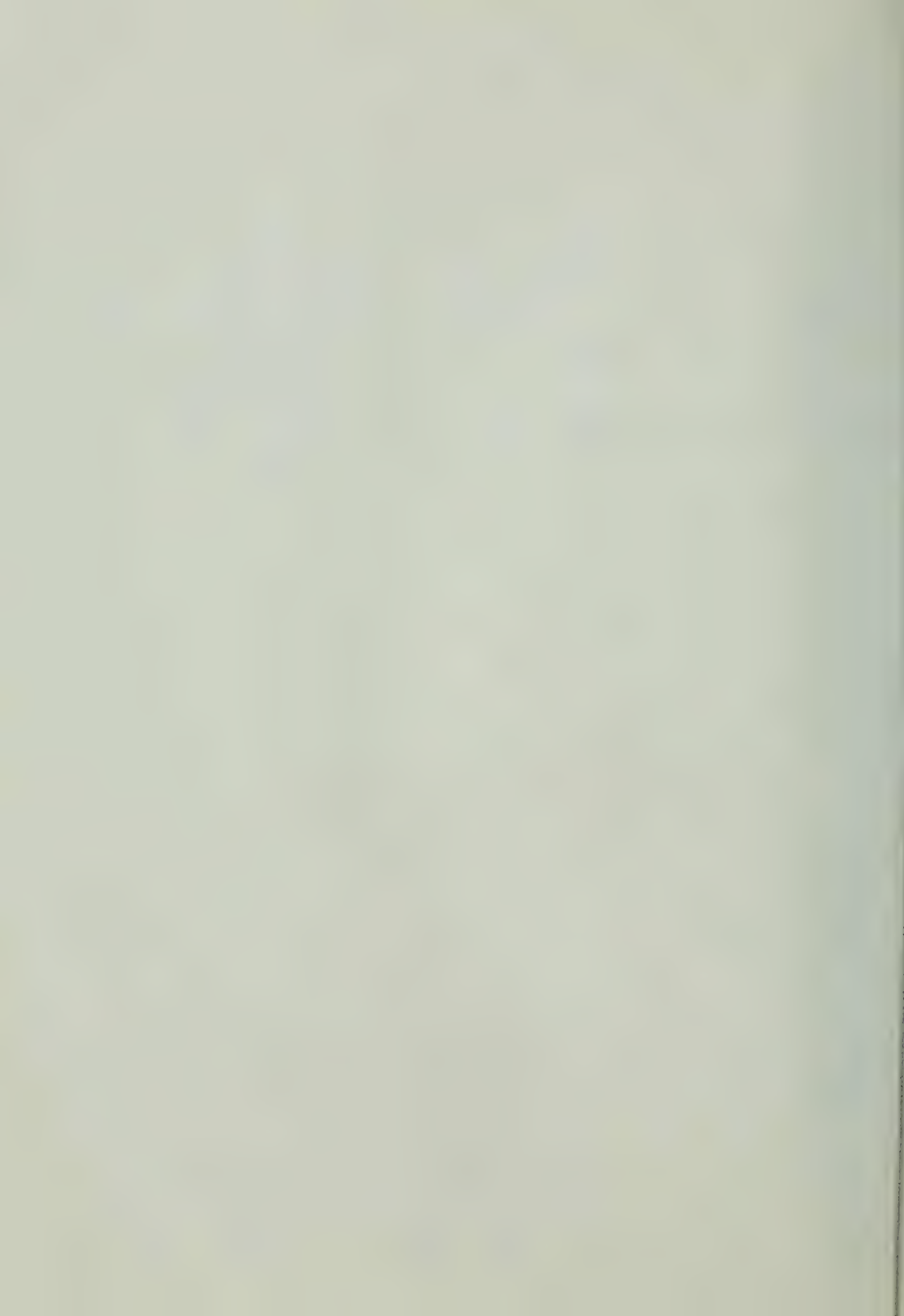
APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

---

EDWIN L. MILLER, JR.,  
United States Attorney,  
PHILLIP W. JOHNSON,  
Assistant U. S. Attorney,

325 West "F" Street,  
San Diego, California 92101,

Attorneys for Appellee,  
United States of America.





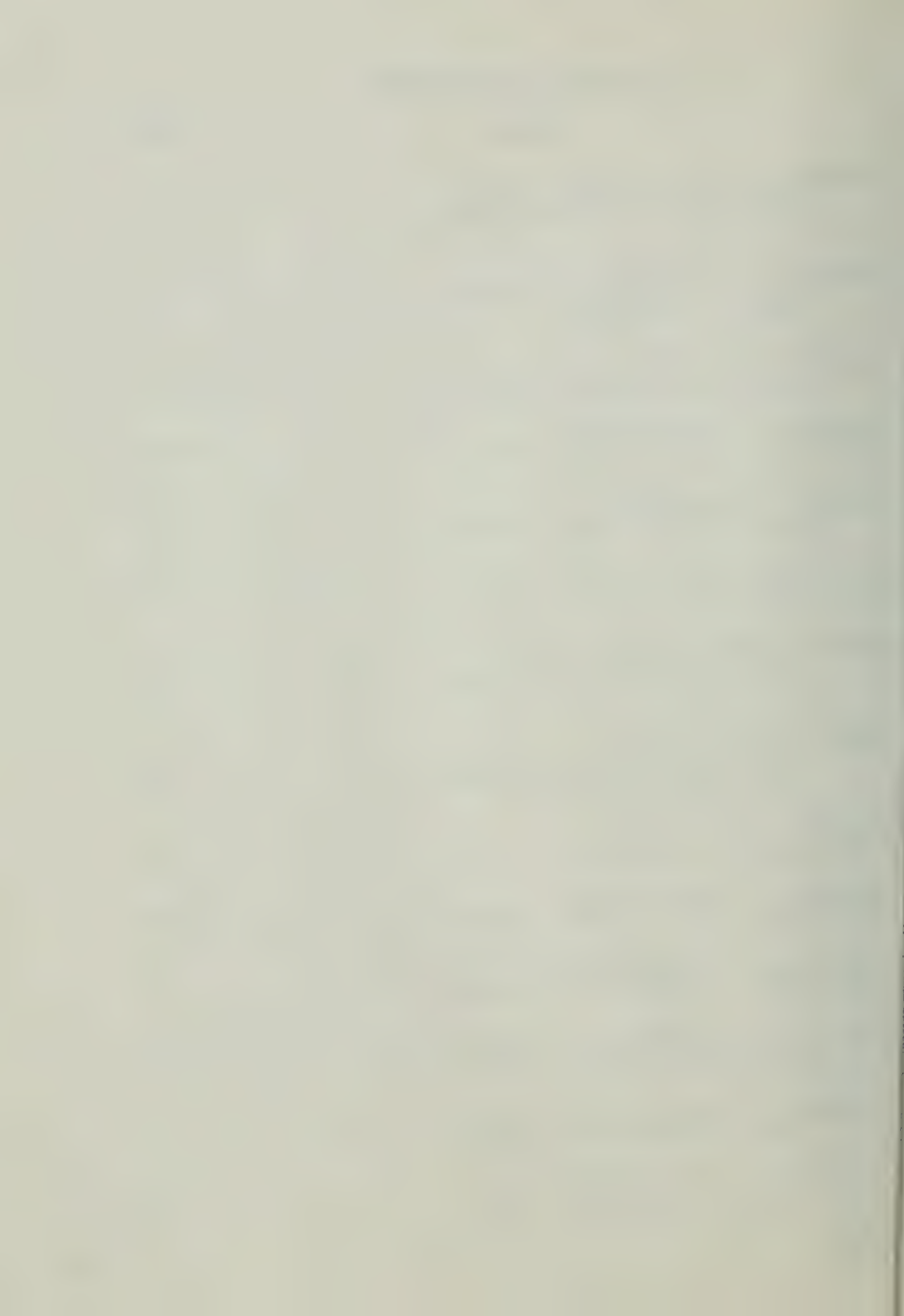
## TOPICAL INDEX

	<u>Page</u>
Table of Authorities	ii
I JURISDICTIONAL STATEMENT	1
II STATEMENT OF THE CASE	2
III ERROR SPECIFIED	2
IV STATEMENT OF THE FACTS	4
A. The Motion to Dismiss.	4
B. The Trial.	6
V ARGUMENT	12
A. PRELIMINARY STATEMENT	12
B. THE OFFICERS HAD PROBABLE CAUSE TO SEARCH THE VEHICLE.	12
C. APPELLANT MAY NOT RAISE THE QUESTION OF TIME TO OBTAIN A SEARCH WARRANT.	17
D. ASSUMING ARGUENDO, THAT THE QUESTION OF TIME TO OBTAIN A SEARCH WARRANT MAY BE RAISED IN THIS APPEAL, REVERSAL OF THE JUDGMENT WILL NOT BE REQUIRED.	19
E. ASSUMING, ARGUENDO, THAT PROB- ABLE CAUSE FOR ARREST OR SEARCH WAS LACKING, THE SEARCH OF THE VEHICLE WAS A VALID BORDER SEARCH.	22
F. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTION.	24
G. THE COURT'S INSTRUCTION UPON THE STATUTORY POSSESSION PRESUMPTION WAS NOT ERRONEOUS.	30
VI CONCLUSION	34
CERTIFICATE	35



## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Abramson v. United States, 326 F.2d 565 (5th Cir. 1964), cert. den. 377 U.S. 957 (1964)	21
Agobian v. United States, 323 F.2d 693 (9th Cir. 1963), 375 U.S. 985 (1964)	31
Aguilar v. United States, 363 F.2d 379 (9th Cir. 1966)	20, 28, 29
Alexander v. United States, 362 F.2d 379 (9th Cir. 1966)	20, 23
Alvarez v. United States, 275 F.2d 299 (5th Cir. 1960)	21
Browning v. United States, 366 F.2d 420 (9th Cir. 1966)	13
Busby v. United States, 296 F.2d 328 (9th Cir. 1961), cert. den. 369 U.S. 876 (1962)	22
Carlo v. United States, 286 F.2d 841 (2nd Cir. 1961), cert. den. 366 U.S. 944 (1961)	21
Carroll v. United States, 267 U.S. 132 (1925)	13, 15
Cervantes v. United States, 263 F.2d 800 (9th Cir. 1959)	16, 24
Cervantes v. United States, 278 F.2d 350 (9th Cir. 1960)	16
Chavez v. United States, 343 F.2d 85 (9th Cir. 1965)	30, 31
Claypole v. United States, 280 F.2d 768 (9th Cir. 1960)	31
Contreras v. United States, 291 F.2d 63 (9th Cir. 1961)	23

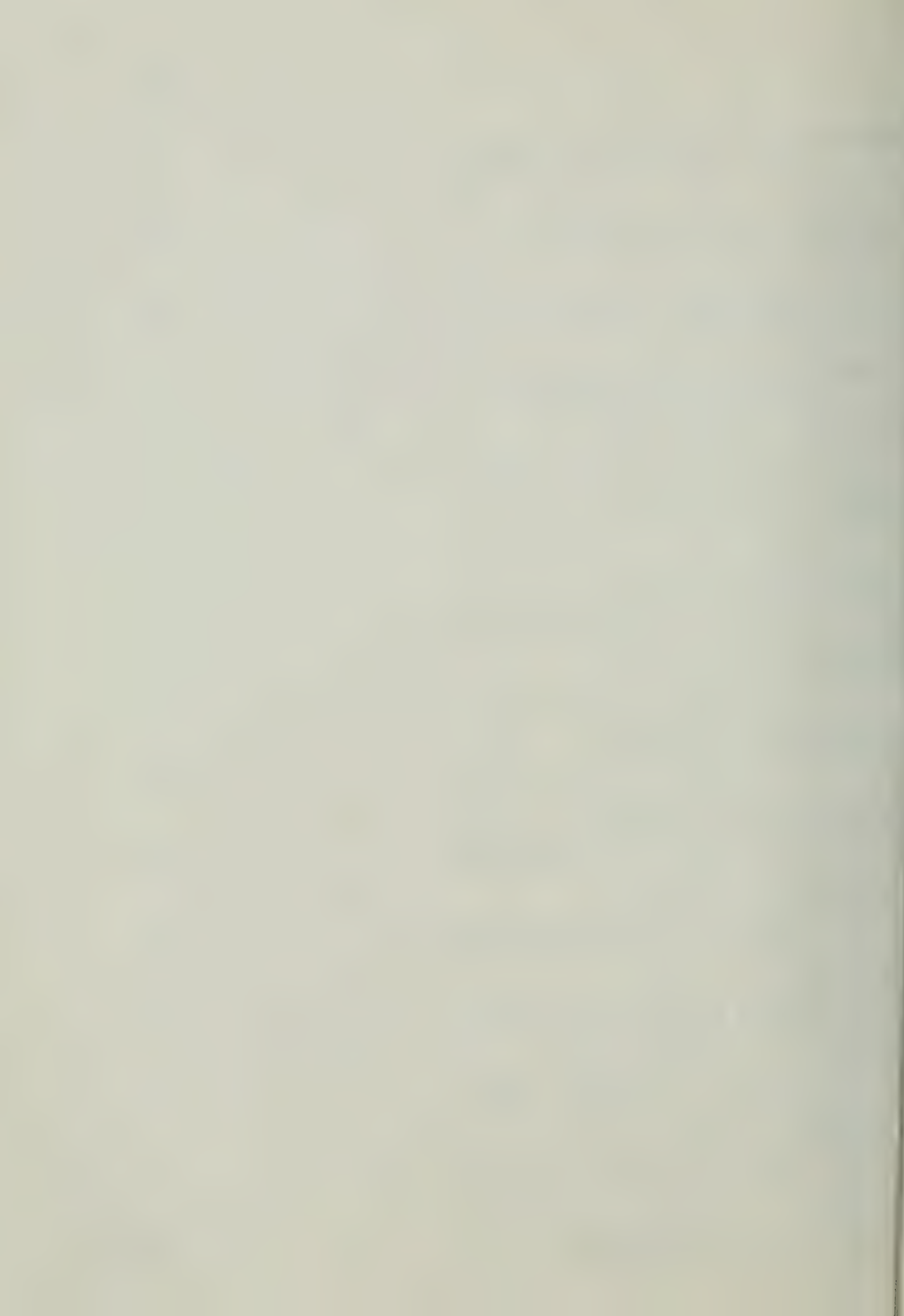


	<u>Page</u>
Corngold v. United States, 9th Circuit, September 29, 1966	20
Costello v. United States, 324 F.2d 260 (9th Cir. 1963), cert. den. 376 U.S. 930 (1964)	14
Dailey v. United States, 261 F.2d 870 (5th Cir. 1958), cert. den. 359 U.S. 969 (1959)	21
Delgado v. United States, 327 F.2d 641 (9th Cir. 1964)	32
Denton v. United States, 310 F.2d 129 (9th Cir. 1962)	22
Diaz-Rosendo v. United States, 357 F.2d 124 (9th Cir. 1966)	23
Eason v. United States, 281 F.2d 818 (9th Cir. 1960)	28
Henry v. United States, 361 U.S. 98 (1959)	16, 17
Jones v. United States, 326 F.2d 124 (9th Cir. 1963), cert. den. 377 U.S. 956 (1964)	14, 15, 16
Karrell v. United States, 247 F.2d 706 (9th Cir. 1957)	24
King v. United States, 348 F.2d 814 (9th Cir. 1965)	23
Klepper v. United States, 331 F.2d 694 (9th Cir. 1964)	31
Landau v. United States Attorney for Southern District, 82 F.2d 285 (2nd Cir. 1946), cert. den. 298 U.S. 665 (1946)	22
Leong Chong Wing v. United States, 95 F.2d 903 (9th Cir. 1938)	13
McDonough v. United States, 248 F.2d 725 (8th Cir. 1957)	29





	<u>Page</u>
Mosco v. United States, 301 F.2d 180 (9th Cir. 1962), cert. den. 371 U.S. 842 (1962)	26
Murphy v. Waterfront Comm'n., 378 U.S. 52 (1964)	24
People v. Garnett, 148 Cal.App.2d 280 (1957)	14
People v. Guerrera, 149 Cal.App.2d 133 (1957)	14
Plazola v. United States, 291 F.2d 56 (9th Cir. 1961)	16, 23, 24
Quiles v. United States, 344 F.2d 490 (9th Cir. 1965)	31
Stein v. United States, 337 F.2d 14 (9th Cir. 1964), cert. den. 380 U.S. 907 (1965)	26
United States v. Campos, 255 F.Supp. 853 (S.D. N.Y. 1966)	14
United States v. Holiday, 319 F.2d 775 (2nd Cir. 1963)	21
United States v. Kapsalis, 313 F.2d 875 (7th Cir. 1963), cert. den. 374 U.S. 856 (1963)	32
United States v. Salgado, 347 F.2d 216 (2nd Cir. 1965), cert. den. 382 U.S. 870 (1965)	14
United States v. Sizer, 292 F.2d 596 (4th Cir. 1961)	21
Ward v. United States, 316 F.2d 113 (9th Cir. 1963)	21
Williams v. United States, 273 F.2d 781 (9th Cir. 1959), cert. den. 362 U.S. 951 (1960)	18
Yee Hem v. United States, 268 U.S. 178 (1925)	31



<u>Statutes</u>	<u>Page</u>
Title 18, United States Code, §3231	1
Title 21, United States Code, §174	30, 31
Title 21, United States Code, §176a	1, 12, 30
Title 28, United States Code, §1291	2
Title 28, United States Code, §1294	2

<u>Texts</u>	
4A C. J. S. p. 1300	33
79 C. J. S. p. 837	13
79 C. J. S. pp. 839-840	13
88 C. J. S. p. 248, note 28	19

<u>Misc.</u>	
27 F. R. D. :	
Instruction No. 24.08, p. 168	31
Instruction No. 24.09, p. 169	31
1965 Manual on Uniform Jury Instructions in Federal Criminal Cases, 36 F. R. D. 609, Instruction No. 17.01-1	31
Federal Rules of Criminal Procedure,	
Rule 30	32
Rules of United States Court of Appeals For the Ninth Circuit:	
Rule 18.2(d)	33



IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

CALIXTO RODRIGUEZ-GONZALEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in a one-count indictment, following trial by jury [C. T. 10]. <sup>1/</sup>

The offense occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 3231, and Title 21, United States Code, Section 176a. Jurisdiction of this Court rests pursuant to Title 28, United

---

<sup>1/</sup> "C. T. " refers to the Clerk's Transcript of Record.





## II

### STATEMENT OF THE CASE

Appellant was charged in a one-count indictment returned by the Federal Grand Jury for the Southern District of California. The indictment alleged that appellant, with intent to defraud the United States, knowingly concealed, and facilitated the transportation and concealment of, approximately 105 pounds of marihuana, knowing that the marihuana had been imported and brought into the United States contrary to law [C. T. 2].

Jury trial of appellant commenced on October 12, 1965, before United States District Judge Fred Kunzel [R. T. 3]. <sup>2/</sup> Appellant was found guilty as charged on October 14, 1965 [C. T. 10].

Thereafter, on December 7, 1965, appellant was committed to the custody of the Attorney General for seven years [C. T. 11]. Appellant subsequently filed a timely notice of appeal [C. T. 13].

## III

### ERROR SPECIFIED

Appellant specifies the following points upon appeal:

"1. The search of the vehicle was not a border

---

<sup>2/</sup> "R. T. " refers to the Reporter's Transcript of Proceedings.



search and no probable cause existed for the search of the vehicle without a warrant.

"2. No probable cause existed for the arrest of the defendant without a warrant.

"3. The informant was not established as reliable.

"4. The evidence was the product of an unlawful search.

"5. The arrest of the defendant was illegal and the contraband was inadmissible in evidence.

"6. The evidence was insufficient to sustain the verdict and judgment of conviction.

"7. The court erred in failing to give the requested instruction, prejudicial to the rights of the defendant.

"8. The court erred in failing to grant the defendant's motion to suppress the evidence.

"9. The court erred in failing to grant the defendant's motion for judgment of acquittal."

[Appellant's Opening Brief, pp. 22-23].



#### IV

### STATEMENT OF THE FACTS

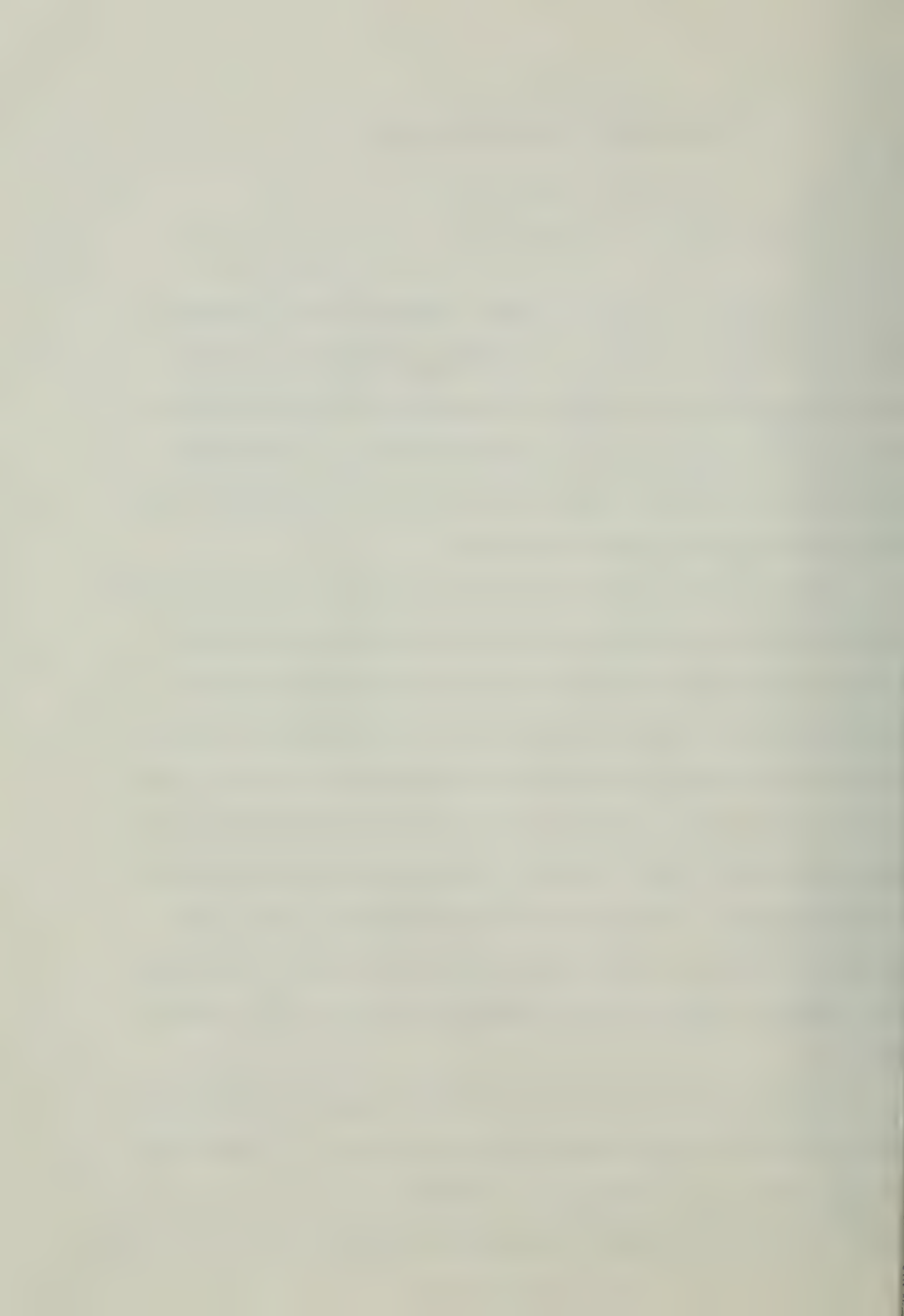
#### A.      The Motion to Dismiss.

---

On the night of June 10, 1965, Customs Port Investigator David F. Burnett was informed that Patricio Becerra, a well-known narcotic dealer in Tijuana, would use three automobiles to facilitate the entry of a load of marihuana into the United States from the Tijuana area. The license numbers of the three vehicles were given to Burnett [R. T. 4, 42-43].

Customs Agent Walter Gates was present at the conversation between Burnett and the informant. The informant had provided Agent Gates with accurate information in the past in regard to Tijuana dealers. On one previous occasion, in May 1965, the informant provided a license number and information resulting in the seizure of a load of marihuana coming into the United States from Mexico in a vehicle [R. T. 48-50, 52-54, 61]. Gates did not know the judicial results of the previous case involving a seizure of marihuana. The informant also had given Burnett accurate information regarding Tijuana narcotic dealers in the past [R. T. 42-43, 51].

On June 11, 1965, Customs Port Investigator Prentice N. White observed a Buick automobile "cross the line". A male was driving with a female passenger. Appellant was not seen at that time. Gates was informed that the Buick arrived in the United





States at San Ysidro at approximately 10:30 p. m. on June 11 [R. T. 26-27, 31-34].

White followed the Buick to San Diego, where it was left at the Ace Parking Lot. The occupants walked away from the lot. At approximately 10:40 a. m. on June 12, 1965, Gates observed appellant, who was walking with a "Mexican-appearing gentleman". Gates was then engaged in surveillance in the Ace Parking lot vicinity [R. T. 28, 29, 31]. The vehicle was parked at that location all night on June 11 and remained there until the afternoon of June 12 [R. T. 32].

The Buick left San Diego on June 12 and went in a northerly direction with appellant as the sole occupant. Upon instructions from Gates, Burnett stopped the Buick at approximately 1:30 p. m. on June 12 [R. T. 9, 25, 26, 34]. The vehicle was stopped approximately four or five miles from San Diego. San Diego is about twenty miles from the port of entry [R. T. 9, 33].

The vehicle had one of the three license numbers that had been provided by the informant [R. T. 24, 43]. The vehicle had been under continuous surveillance from the time that it entered the United States until it was stopped by Burnett [R. T. 33].

Gates had also been informed by Customs Agent John D. Maxcy that there was marihuana in the vehicle [R. T. 32].

Burnett removed packages of marihuana from the side panels of the vehicle [R. T. 4-5, 10, 15-16]. <sup>3/</sup> There was no warrant of

---

<sup>3/</sup> This evidence was heard by the court and jury prior to the time that the Motion to Dismiss was made.



arrest and no search warrant [R. T. 19].

The trial Court held that there was probable cause for the arrest and probable cause for the search. The Motion to Dismiss was denied [R. T. 37, 55].

## B. The Trial

---

On the night of June 11, 1965, United States Customs Port Investigator Prentice N. White observed a Buick automobile as it crossed the boundary line at San Ysidro, California. The vehicle was occupied by a male and a female. White believed that appellant was not in the vehicle [R. T. 57-58].

Another officer, Customs Port Investigator David F. Burnett, had received information concerning the same Buick on approximately June 10 [R. T. 3-4, 6-7, 9].

Investigator White followed the Buick to the Ace Parking lot in San Diego. The vehicle entered the parking lot at approximately 11:05 or 11:10 p.m., and the occupants left the vehicle and walked down the street [R. T. 58-59].

At about 10:30 a.m. on the following day, June 12, 1965, appellant and a Mexican-appearing individual approached the Buick at the Ace Parking Lot. They "looked the vehicle over" and talked for awhile, and then one of them, believed to be appellant, opened the door on the driver's seat. It appeared that he was searching in the front seat area [R. T. 160-61].

The other man then opened the door upon the opposite side



and watched. Then they closed the doors and walked away. Appellant on the same date waited in line with a male Mexican at the Greyhound Bus Depot, purchased a bus ticket, and gave it to the Mexican. Appellant again approached the Buick at approximately 12:30 p. m. , but did not enter it [R. T. 66, 138-39, 162].

Appellant then walked up the street, came back "down and around the car", walked up another street, and entered the Chi Chi Bar at approximately 1:20 p. m. He left the bar and drove away from the parking lot in the Buick at approximately 1:30 p. m. after receiving some assistance from the parking lot attendant, who started the vehicle [R. T. 65-67, 162]. Appellant and the attendant were the only persons who approached the vehicle between the time that appellant and the Mexican-appearing individual approached it, and the time that appellant drove it away. The attendant did not approach it between 10:30 a. m. , and the time that he came to start it [R. T. 163].

The Buick left the parking lot in an easterly direction and then headed to the north with officers following. Customs Agent John D. Maxcy employed a siren and flashing red light in an effort to halt the Buick, but it did not stop. Agent Maxcy radioed to occupants of another Customs vehicle, asking them to get in front of the Buick and attempt to box it in. The Buick traveled for approximately one-fourth of a mile while two vehicles were using flashing red lights. The vehicles did not have law enforcement markings, and the officers were not in uniform [R. T. 148-50, 152].

The Buick stopped after Agent Maxcy's vehicle bumped into





its rear bumper. Appellant, the driver and only occupant, was arrested at about 1:50 p.m. [R. T. 5, 65-66, 150]. The Buick was stopped in San Diego County, about four or five miles from downtown San Diego [R. T. 5-6].

Investigator Burnett removed a number of packages from the side panels of the Buick. The panels were removed by the use of a screwdriver, and the packages were not visible until the panels were removed. It was stipulated that sample quantities from the packages contained marihuana [R. T. 4-5, 10, 15-16, 73].

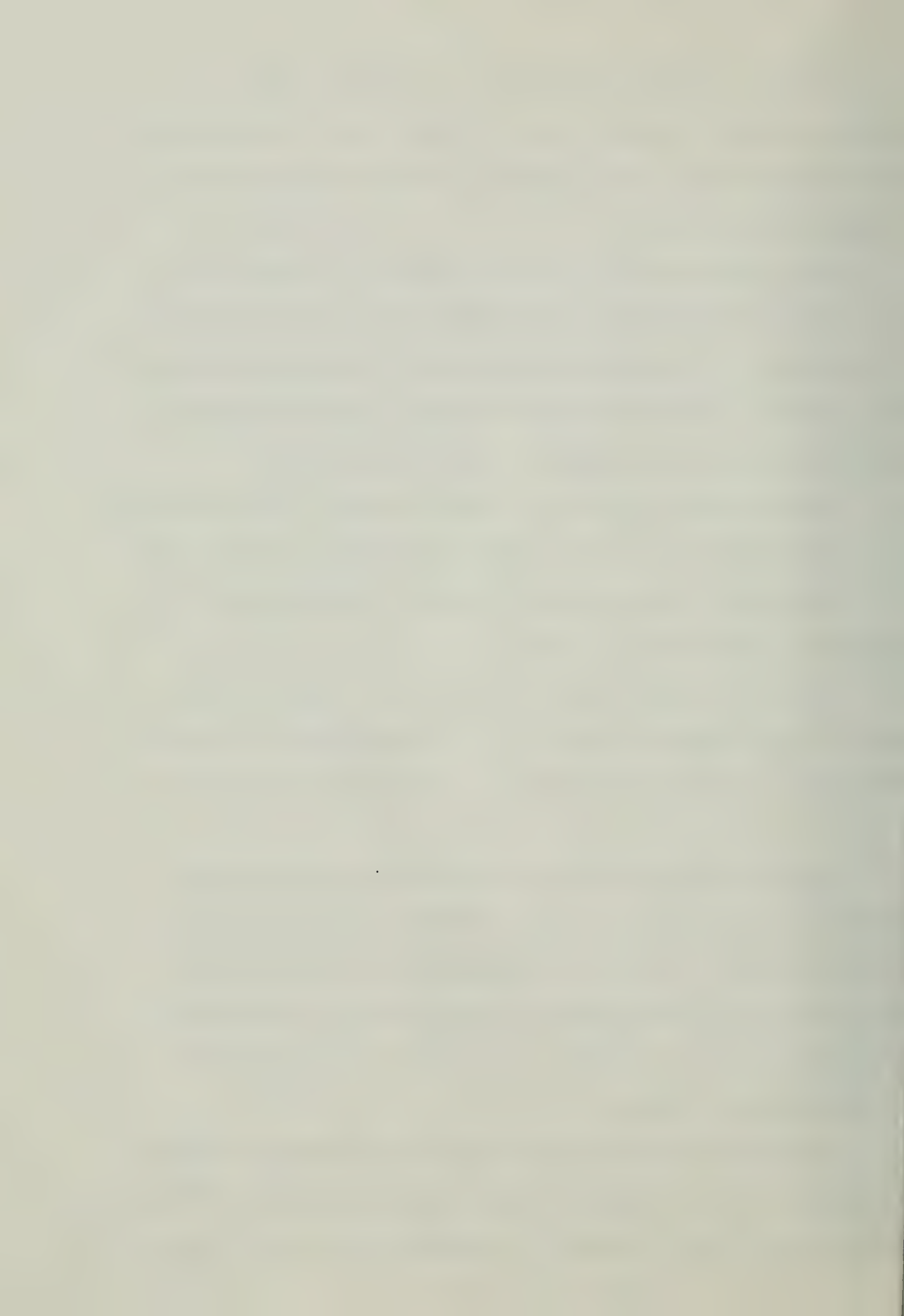
The packages weighed more than 104 pounds. The marihuana had a selling price of at least \$1,500 in Tijuana [R. T. 13-14, 149].

A key was in the ignition of the Buick at the time that appellant was arrested [R. T. 165].

Appellant refused to state where he was living. He was asked, "Where did you get the car you were driving?". He replied, "What car? I wasn't driving any car." Everyone laughed [R. T. 68-69, 128].

Appellant testified that he had arrived in Los Angeles on May 20, having driven from Miami, Florida, to Los Angeles with one Emma Perez, who had wanted someone to help her with the driving [R. T. 78-79, 87, 121-22]. During the trip, appellant did not always register at motels in his true name, although he was not married [R. T. 88-89].

Appellant also testified that after the completion of the trip, Emma Perez told him that she would transfer the vehicle, a 1965 Pontiac, to his name, because she owed money on it and could tell



the creditor that it was no longer hers. Subsequently, according to appellant's testimony, Emma's brother-in-law, "Pedro", brought appellant to San Diego to meet one "Lalo", a Mexican who was supposed to give the Buick and \$1,000 to appellant, who was to give the ownership paper to the Pontiac to "Lalo" [R. T. 89-91].

Appellant testified that after he returned to Los Angeles, "Pedro" asked appellant to do him the favor of coming to San Diego, because "Pedro" was unable to come and pick up the car, and "Pedro" told appellant to give the man the ownership paper on the Pontiac if the man gave appellant the \$1,000 [R. T. 92].

Appellant also testified that "Pedro" gave appellant the ownership paper on the Pontiac and told him that he had transferred the ownership to appellant's name. Appellant later testified that Emma gave him the paper on the Pontiac and said that it was a paper about ownership of the car [R. T. 92-95, 114]. The paper actually was a fictitious bill of sale with no license number and a fictitious motor number [R. T. 131-32].

Appellant testified that he was to drive the Buick as a favor to Emma. He also testified that "Pedro" asked him to make the second trip to San Diego as a favor to "Pedro" [R. T. 92-92]. However, he also testified that Emma gave him forty dollars for the second trip to San Diego and that he was supposed to deliver the Buick to Emma in Los Angeles [R. T. 80, 113-14].

Appellant testified that on the date of his arrest, he went from the Greyhound Depot to the parking lot with "Lalo", and both of them looked at the Buick and attempted to find the key. He



testified that "Lalo" took him to the parking lot and that there had been a change in plans, as "Lalo" would not give the money, so Emma was to come down and get the \$1,000 [R. T. 93-94, 96-97]. He testified that he and "Lalo" did not find the key, and that it was about 10 or 11 a.m. [R. T. 81, 97].

Appellant testified that while he and "Lalo" were at the car, he did not observe anyone go into a telephone booth. He subsequently testified that while they were there, "Lalo" made a telephone call to find out about the key, and appellant dialed the operator, left the booth, and did not hear the conversation because he was several yards away [R. T. 106-09].

Customs Agent Walter Gates testified that appellant and another man entered a telephone booth at that location, that they stepped out of the booth together, one right after the other, and that they then left the scene [R. T. 61, 159-60].

Appellant testified that after he and "Lalo" failed to find the key, "Lalo" said that he would look for the key and that appellant should call him by telephone. He testified that "Lalo" said that it would take about an hour and a half to get the key, that the telephone number was a seven-digit number, and that he did not write it down [R. T. 98, 110-11]. He also testified that he went back to the Greyhound Depot with "Lalo" and did not go inside. However, Customs Port Investigator Donald R. Carter testified that appellant and a Mexican waited in line in the Greyhound depot and that appellant purchased a bus ticket and gave it to the other man [R. T. 110, 137, 139].





Appellant testified that he left the bus depot, got something to eat, walked around, had a beer, and made telephone calls to Emma and "Lalo". He testified that he called Emma to tell her that he already had the key and that he did not get the money. He also testified that the call to "Lalo" was made after the call to Emma and that "Lalo" said that he had left the key in the car [R. T. 111-12]. Appellant testified that he found the key on the floor of the car, that they had looked at that spot before, and that he was sure that the key was not there on the first occasion [R. T. 81, 97-98].

He testified that he could not start the car, so he called Emma again and was about to call a towing service when the parking lot attendant told him that the car was started [R. T. 113].

Appellant also testified that he drove toward Los Angeles and was arrested, that he did not know that marihuana was in the automobile, and that he knew that the officers wanted him to stop but he could not do so because the brakes were not working properly. He testified that it took about the length of a city block for him to stop. Two officers testified that they operated the Buick and recalled no difficulty with the brakes, although one officer noted that it did not steer well [R. T. 82-83, 115-16, 154-58].

Appellant refused to give the name of the man who allegedly asked him to drive the car to Los Angeles. After the Court ordered him to answer, he gave the name "Pedro" [R. T. 83-84].

Appellant testified that he knew where "Pedro" lived and that he knew where Emma lived [R. T. 84, 119]. He had not mentioned "Lalo", "Pedro", or Emma to the officers [R. T. 117].



The Court instructed the jury in regard to the possession presumption under Title 21, United States Code, Section 176a [R. T. 207-10, 213].

V

ARGUMENT

A. PRELIMINARY STATEMENT

Since appellant's list of points upon appeal contains considerable repetition, appellee will not attempt to discuss these issues in the order in which they are raised by appellant.

B. THE OFFICERS HAD PROBABLE CAUSE TO SEARCH THE VEHICLE.

Appellant contends that the officers lacked probable cause to search the Buick or arrest appellant and that the motion to suppress evidence (also referred to as a "Motion to Dismiss") should have been granted upon the ground that the evidence was the product of an unlawful search.

However, it should be noted that the question of probable cause to arrest appellant may be immaterial. A vehicle may be searched where there is probable cause to believe that it contains smuggled merchandise.



Browning v. United States, 366 F.2d 420, 422

(9th Cir. 1966).

"The rule followed in the federal courts and in a number of state courts is that if the search of a motor vehicle, although without a warrant, is made on probable cause, or on a belief reasonably arising out of circumstances known to the officer that the vehicle contains contraband, the search is valid."

79 C. J. S. p. 837.

This rule was followed by this Court in Leong Chong Wing v. United States, 95 F.2d 903, 904 (9th Cir. 1938) (opium case).

"This search on probable cause is not to be confused with the search on probable cause justifying an arrest and incidental search, as the two are quite distinct, the right to search the vehicle being independent of the right to arrest; hence, an arrest need not precede such a search." (emphasis added).

79 C. J. S. pp. 839-40.

"The right to search and the validity of the seizure are not dependent on the right to arrest."

Carroll v. United States, 267 U. S. 132, 158 (1925).

Although probable cause to arrest was not required, it is respectfully submitted that the officers had probable cause to arrest





as well as probable cause to believe that the vehicle contained contraband at the time that the vehicle was stopped.

An arrest may be based solely upon information provided by a single reliable informant.

Costello v. United States, 324 F.2d 260, 262

(9th Cir. 1963), cert. den. 376 U.S. 930  
(1964);

Jones v. United States, 326 F.2d 124, 128-129

(9th Cir. 1963), cert. den. 377 U.S. 956  
(1964);

United States v. Salgado, 347 F.2d 216, 217

(2nd Cir. 1965), cert. den. 382 U.S. 870  
(1965);

United States v. Campos, 255 F. Supp. 853, 857

(S. D. N. Y. 1966);

People v. Guerrera, 149 Cal. App.2d 133, 136 (1957);

People v. Garnett, 148 Cal. App.2d 280, 284 (1957).

The informant herein had provided reliable information in a number of cases in the past. He not only had given Agent Gates accurate information in regard to Tijuana dealers, but he also provided a license number and information resulting in the seizure of a load of marihuana coming into the United States from Mexico in a vehicle. This had occurred recently, in the previous month. The informant also had given Investigator Burnett accurate information in the past [R. T. 42-43, 48-54, 61].

Since he was a previously-reliable informant, no



corroboration of his statements was required.

Jones v. United States, supra, 326 F.2d 124, 128-29.

However, if it be assumed, arguendo, that corroboration of the informant's statements was required, there was ample corroboration here. A vehicle with one of the three license numbers did enter the United States at San Ysidro on the day following the conversation with the informant [R. T. 31-32, 34, 42-43]. Two persons left the vehicle in San Diego, and on the following day, appellant, who was not observed in the vehicle when it crossed the border, approached the vehicle with another man. After they "looked the vehicle over" and talked for awhile, they opened the doors, and one of them appeared to be searching for something in the front seat area [R. T. 58-59, 160-61]. <sup>4/</sup>

This tended to strongly corroborate the informant's statements, indicating the obvious stratagem in which the consignee and purchaser of marihuana has someone else risk the perils of bringing the contraband across the international boundary. Appellant's general wanderings in the area after his first trip to the vehicle [R. T. 66-67], were consistent with the expected activities of a man who desires to pick up a car loaded with contraband but also wants to carefully study the area to insure that no officers in plain clothes are watching the vehicle. Appellant's purchase of a bus ticket for

---

<sup>4/</sup> Some of this evidence was received after the Motion to Dismiss (or to suppress evidence) was denied. However, when the legality of a search is questioned upon appeal, it is proper to consider evidence received at the trial after a motion to suppress evidence was denied.

Carroll v. United States, 267 U. S. 132, 162 (1925).



a man who got into a line for a bus to San Ysidro or the Border area [R. T. 139], also was consistent with the information regarding an international conspiracy. One of these corroborating facts, standing alone, might not be decisive, but all of the available evidence was consistent with the information provided by the previously-reliable informant. Consequently, the officers had ample probable cause to believe that there was contraband in the vehicle. The facts and circumstances, particularly the reliable information provided in the past and the appearance of the vehicle at San Ysidro, were more than sufficient to "warrant a prudent man in believing that the offense has been committed". <sup>5/</sup>

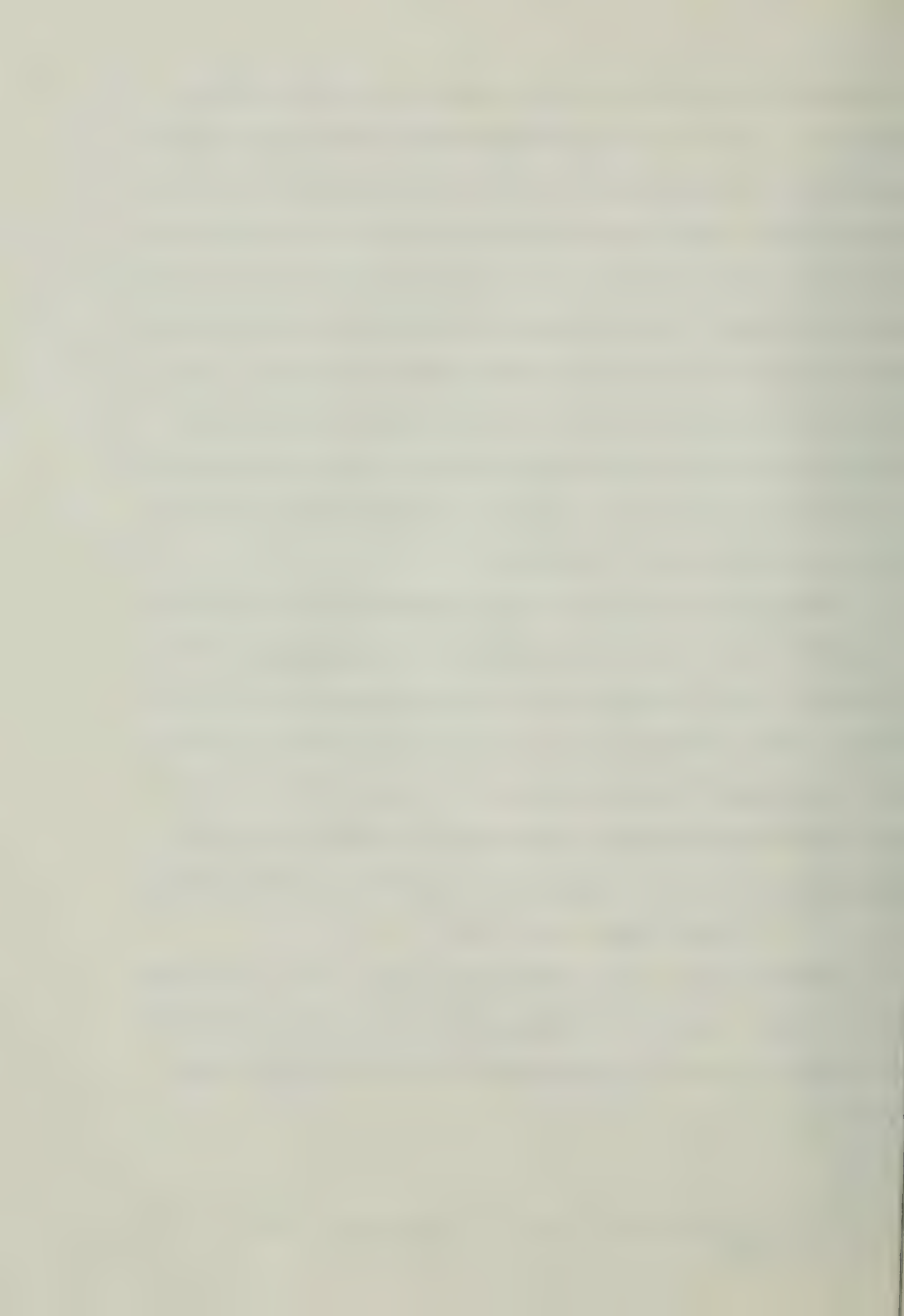
Appellant cites Plazola v. United States, 291 F.2d 56 (9th Cir. 1961), and also mentions Cervantes v. United States, 263 F.2d 800 (9th Cir. 1959) and Cervantes v. United States, 278 F.2d 350 (9th Cir. 1960). These cases are clearly distinguishable upon the facts. In Plazola, the information was not specific (at p. 58) and there was no showing that the informant was reliable (at p. 60). In Cervantes the informant's information was "'stale and inaccurate'".

Jones, supra, at p. 128.

Appellant also relies upon Henry, supra, 361 U.S. 98. However, in Henry, there is no indication that the informant had been previously accurate nor is there any indication that he provided definite information in that case:

---

<sup>5/</sup> The language is from Henry v. United States, 361 U.S. 98, 102 (1959).





"But, so far as the record shows, he never went so far as to tell the agents he suspected Pierotti of any such thefts."

Henry, supra, at p. 99.

In the instant case, the officers had far more evidence than appears in the discussion of the facts in Henry, and they had abundant probable cause to believe that the vehicle contained contraband.

C. APPELLANT MAY NOT RAISE THE QUESTION OF TIME TO OBTAIN A SEARCH WARRANT.

---

Appellant contends that the officers should have obtained a search warrant:

"The time was ample, the opportunity available. No excuse was given for failure to have a search warrant issued." [Appellant's Opening Brief, p. 27].

Appellant did not raise this issue in the trial Court, so there was no reason to provide an excuse for failure to obtain a search warrant, and there was no evidence that there was an opportunity to obtain a search warrant.

Appellant made no motion to suppress evidence prior to trial. During the trial, his counsel asked a question which resulted in a question from the Court regarding its materiality. Appellant's attorney stated that he was raising the question of whether there was a warrant of arrest [R. T. 7]. Appellant later introduced



evidence in support of a motion which was described at various times as a "motion to strike" or a "motion to dismiss" [R. T. 17, 19, 35, 55]. The motion was based upon the contention that the reliability of the informant was not established, with a secondary reference to the need for a warrant [R. T. 35-36, 38]. Appellant was again referring to a warrant of arrest [R. T. 36-37]. Appellant did not raise the question of time to obtain a search warrant. Had he done so, evidence might have been introduced regarding the existence of circumstances justifying a search without a warrant and also regarding the opportunity to obtain a search warrant. June 12, 1965, was a Saturday. Agent Gates was informed that the vehicle arrived in San Ysidro at approximately 10:30 p.m., on June 11 [R. T. 31-32]. This was Friday night. In an analogous situation involving speedy arraignments before the Commissioner, this Court stated that "we are unable to say as a matter of law, that Rule 5(a) requires round the clock availability of a commissioner".

Williams v. United States, 273 F.2d 781, 798

(9th Cir. 1959), cert. den. 362 U.S. 951

(1960).

Had appellant raised the issue, these matters could have been explored in the trial Court.

"Ground of objection to admission of evidence must be stated with perspicuity and particularity, so that court and opposing party may not be misled [citing cases].



"One seeking to exclude evidence should be explicit and disclose at the trial court all defects in the proposed proof which he expects to urge in case of an appeal [citing cases]. "

88 C. J. S. p. 248, note 28.

D.        ASSUMING ARGUENDO, THAT THE  
            QUESTION OF TIME TO OBTAIN A  
            SEARCH WARRANT MAY BE RAISED  
            IN THIS APPEAL, REVERSAL OF THE  
            JUDGMENT WILL NOT BE REQUIRED.

---

If it be assumed, for purposes of argument only, that the question of time to obtain a search warrant may be raised in this appeal, a reversal of the judgment would not be required in the state of the evidence in this case.

Although the vehicle was at the parking lot for a considerable period of time, there was risk of movement at all times. The officers did not know whether they had sufficient time to obtain a search warrant. There was a risk that the vehicle would be removed from the jurisdiction. Had one of the conspirators sensed the presence of the officers who participated in the





surveillance, he could have hired an innocent dupe to transport the marihuana the short distance to Mexico in an effort to salvage the vehicle and the valuable marihuana load (at least \$1,500). In addition if the officers had obtained a search warrant, this would have been of great assistance to the primary conspirators (as distinguished from the original driver), who would have had an opportunity to observe the search from the neighborhood and an opportunity to escape arrest or at least to avoid the risk of facing sufficient evidence at trial. This Court has emphasized the desirability of reaching "the real rascal" in a marihuana-smuggling case.

Aguilar v. United States, 363 F.2d 379, 381

(9th Cir. 1966).

[Also see:

Alexander v. United States, 362 F.2d 379, 382

(9th Cir. 1966), referring to the desirability of delayed searches in smuggling cases].

There are two additional reasons for rejecting appellant's claim that the officers had sufficient time to obtain a search warrant. If the search was incidental to a lawful arrest, or if it was a border search, the rule upon which appellant relies would be immaterial. It has been indicated that where a search is based upon probable cause to believe that contraband is present, a search without a warrant is not justified unless special circumstances exist.

Corngold v. United States, 9th Cir., Sept. 29, 1966.

However, where the question is whether a search may be



subject to attack because there was an alleged delay in obtaining an arrest warrant, the delay in obtaining the warrant of arrest of immaterial.

Ward v. United States, 316 F.2d 113 (9th Cir. 1963);

Dailey v. United States, 261 F.2d 870, 872

(5th Cir. 1958), cert. den. 359 U.S. 969

(1959);

United States v. Sizer, 292 F.2d 596, 599

(4th Cir. 1961);

Carlo v. United States, 286 F.2d 841, 846

(2nd Cir. 1961), cert. den. 366 U.S. 944

(1961);

Alvarez v. United States, 275 F.2d 299, 302

(5th Cir. 1960);

United States v. Holiday, 319 F.2d 775, 776

(2nd Cir. 1963);

Abramson v. United States, 326 F.2d 565, 567

(5th Cir. 1964), cert. den. 377 U.S. 957

(1964).

Since the search was incidental to a lawful arrest (as well as being a border search and a contraband probable cause search), no search warrant was required, and a delay in obtaining a search warrant would be immaterial.

The time of arrest in relation to the search would not necessarily be decisive, as the search may precede the arrest, under appropriate circumstances.



Busby v. United States, 296 F.2d 328, 332

(9th Cir. 1961), cert. den. 369 U.S. 876

(1962).

Furthermore, appellant asserts that he was arrested at the moment that the vehicle was stopped (Appellant's Opening Brief, p. 26).

If the search was a valid border search, there again would be no question in regard to delay in obtaining a search warrant, because a warrant is not required for a border search.

Denton v. United States, 310 F.2d 129, 132

(9th Cir. 1962);

Landau v. United States Attorney for Southern Dist.,

82 F.2d 285, 286 (2nd Cir. 1946), cert. den.

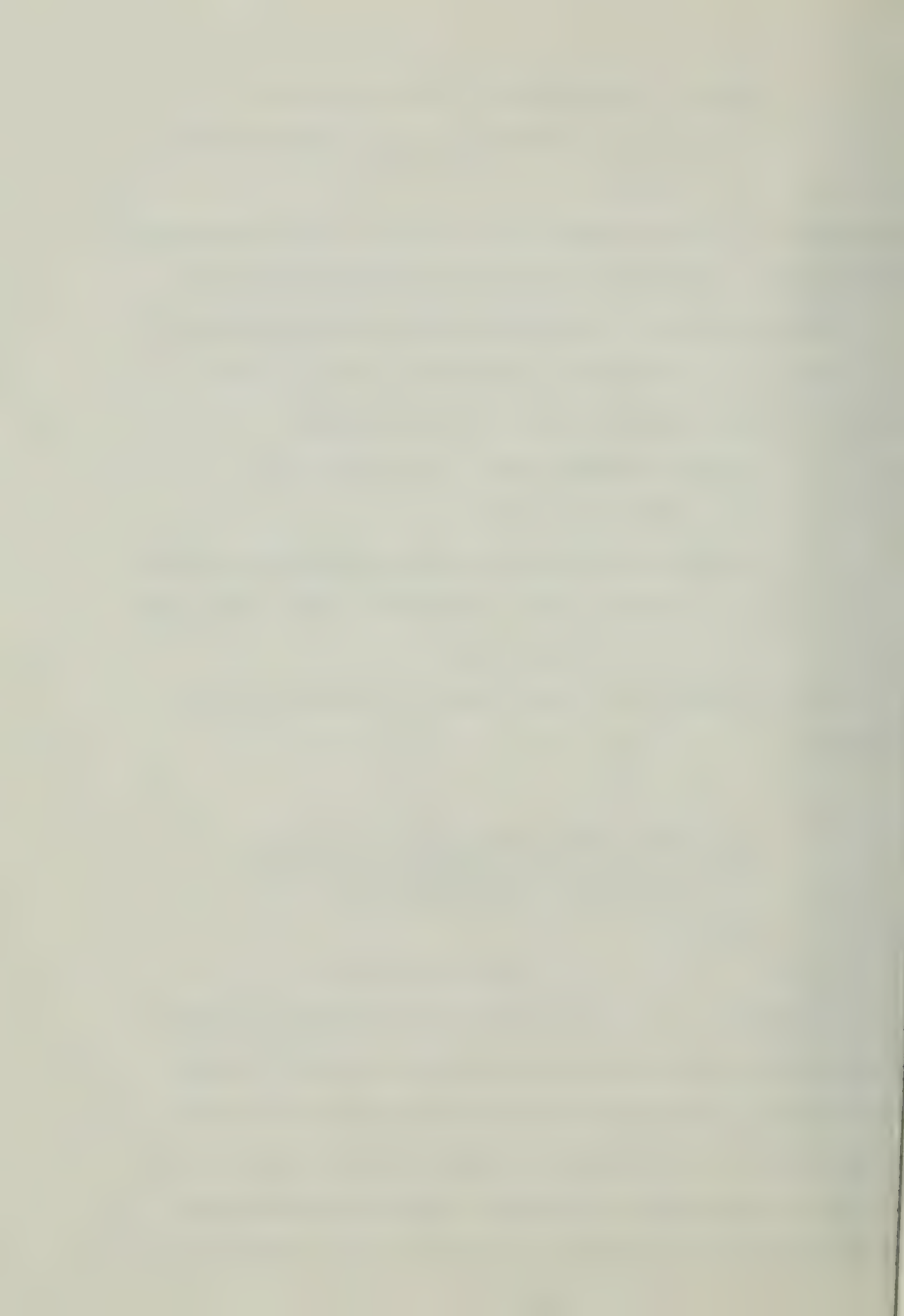
298 U.S. 665 (1936).

The discussion of the border search issue appears under "E" below.

E.      ASSUMING, ARGUENDO, THAT PROB-  
          ABLE CAUSE FOR ARREST OR SEARCH  
          WAS LACKING, THE SEARCH OF THE  
          VEHICLE WAS A VALID BORDER  
          SEARCH.

---

The trial Court did not rule upon the question as to whether the search of the vehicle herein was a border search. The trial occurred prior to this Court's ruling that the legality of a search for contraband by Customs officers away from the border "must be tested by a determination whether the totality of the surrounding circumstances . . . are such as to convince the fact finder with





reasonable certainty that any contraband which might be found in or on the vehicle at the time of search was aboard the vehicle at the time of entry into the jurisdiction of the United States. Any search by Customs officials which meets this test is properly called a 'border search'."

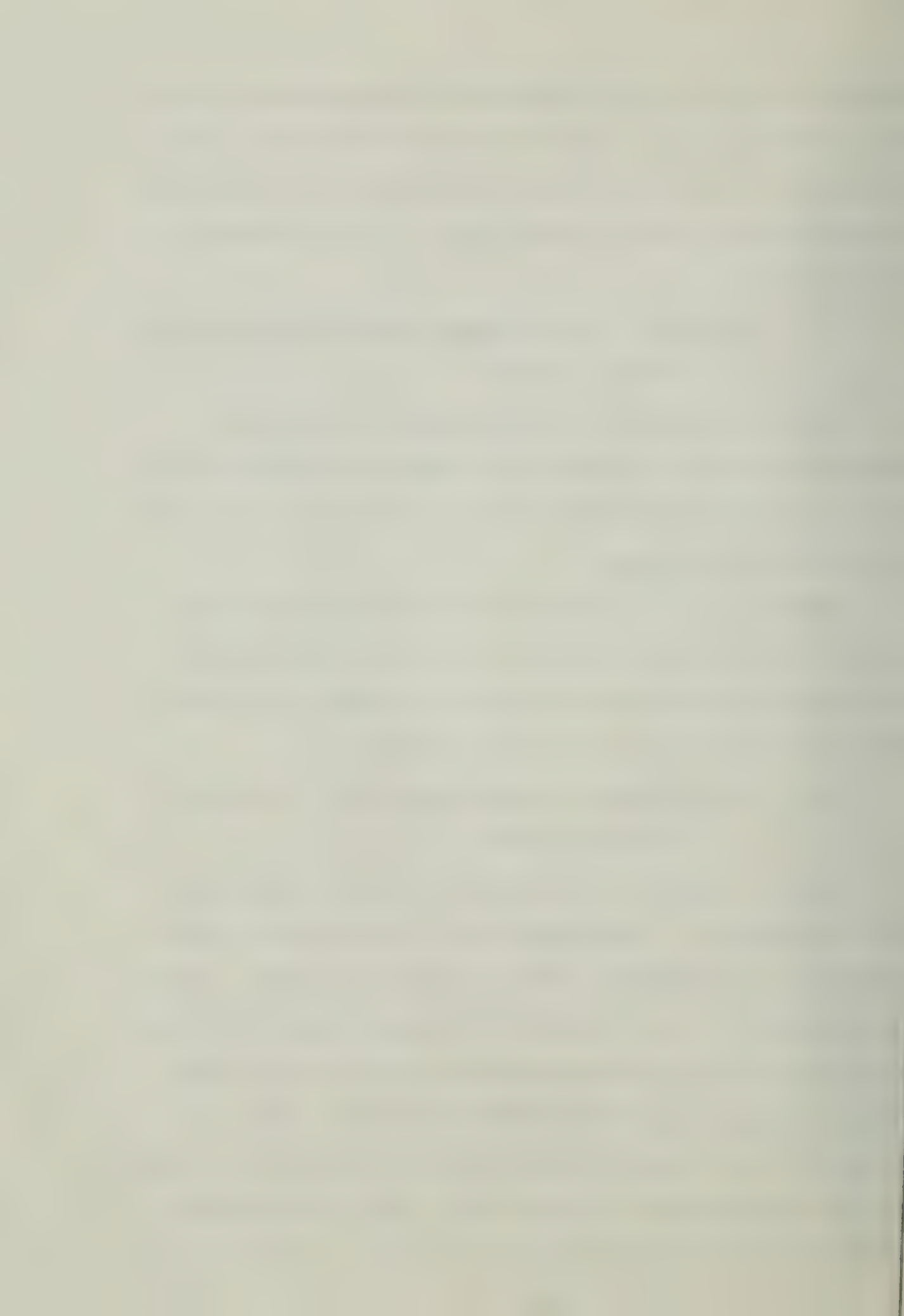
Alexander v. United States, supra, 362 F.2d 379, 382  
(9th Cir. 1966).

Since the vehicle was constantly under surveillance by Customs officers from the time that it crossed the border until the moment that it was stopped [R. T. 33], the facts of this case clearly satisfy the test in Alexander.

While the trial Court did not rule upon the border search question, its ruling upon the motion to suppress evidence may be upheld upon the ground that the search was a border search, even though the trial Court did not rely upon that ground.

See: Diaz-Rosendo v. United States, 357 F.2d 124, 130  
(9th Cir. 1966).

Appellant contends that the search was not a border search and cites Contreras v. United States, 291 F.2d 63 (9th Cir. 1961), and Plazola v. United States, 291 F.2d 56 (9th Cir. 1961). However, in Contreras, there was no history of continuous surveillance from the border, a factor that was emphasized in the more recent case of King v. United States, 348 F.2d 814, 816 (9th Cir. 1965). In Plazola, the primary search was the search of a Mercury automobile operated by the defendant's co-conspirator, Singh. This vehicle contained approximately 58 pounds of marihuana, while the



appellant's vehicle contained one marihuana seed. It would have been an extraordinary proposition to argue that the search of the Mercury was a border search, as there apparently was no evidence that the Mercury recently crossed the border. <sup>6/</sup> While the opinion discusses the search of the appellant's vehicle, which did cross the border, it may be questioned whether it was essential to determine the validity of the search of that vehicle, because the marihuana seed was discovered after the officers had probable cause for appellant's arrest (Plazola, supra, at p. 62).

F. THE EVIDENCE WAS SUFFICIENT  
TO SUSTAIN THE CONVICTION.

---

Appellant contends that the evidence was insufficient to support the verdict and judgment and that appellant's motion for judgment of acquittal should have been granted. Appellant cites Cervantes, supra, 263 F.2d 800. Cervantes is concerned with the question of probable cause to arrest. Since the primary evidence (the contraband) in that case should have been suppressed, the remaining evidence would clearly have been insufficient.

---

<sup>6/</sup> This information appears in Appellee's Brief in Plazola, No. 17132, p. 4. The Mercury was observed by officers north of the intersection of Highway 80 and Highway 111.

It is a proper practice to refer to appellate briefs in order to determine whether a particular question was raised upon appeal, e. g., Murphy v. Waterfront Comm'n., 378 U.S. 52, 65-66 (1964); Karrell v. United States, 247 F.2d 706, 709-10 (9th Cir. 1957).



However, in the instant case, the marihuana was lawfully seized from a vehicle operated by appellant, the sole occupant [R. T. 4-5, 9, 15-16].

The jury heard appellant's version of the incident. His story was completely unreasonable, if not absurd, and his testimony was clearly impeached upon material matters. According to appellant's version, he and "Lalo" went to the parked vehicle and unsuccessfully attempted to find the key, after which "Lalo" said that he would look for the key and added that appellant should call him by telephone. He testified that "Lalo" later said that he had left the key in the car and that appellant subsequently found the key on the floor of the car. He was certain that the key was not there at the first time that he was there [R. T. 97-98, 111].

However, Investigator Hanson testified that appellant and the attendant were the only persons who approached the vehicle between the time that appellant and the other individual approached it, and the time that appellant drove it away. He also testified that the attendant did not approach the vehicle between 10:30 a.m. and the time that he came to start it [R. T. 163]. Appellant and the Mexican-appearing individual approached the vehicle at approximately 10:30 a.m. [R. T. 161]. From this evidence, it was impossible for anyone to leave the key in the vehicle without being observed, since the vehicle was continuously in Hanson's view [R. T. 163]. At this point appellant's entire narrative of events collapses in the light of the accepted facts, i. e., Hanson's testimony.

Evidence upon appeal is viewed in the light most favorable





to the prevailing party in the trial court.

Stein v. United States, 337 F.2d 14, 16 (9th Cir.1964),  
cert. denied, 380 U.S. 907 (1965);

Mosco v. United States, 301 F.2d 180, 181  
(9th Cir. 1962), cert.denied, 371 U.S.842  
(1962).

Another major weakness in the defense was the fact that appellant claimed that "Lalo" gave him a seven-digit telephone number and told him to telephone "Lalo" but appellant did not write down the number [R. T. 98, 110]. The marihuana was worth at least \$1,500 in Mexico [R. T. 149]. According to appellant's version, the success of the entire conspiracy was left to stand or fall upon appellant's ability to remember a seven-digit telephone number, so that he could find out about the key to the vehicle. This is completely unreasonable, to say nothing of the oddity of a plan whereby appellant would telephone "Lalo" instead of "Lalo" telephoning appellant at a pay telephone when "Lalo" was ready.

There were other serious weaknesses in the defense. Appellant testified that he was to pick up the Buick as a favor for Emma. He also testified that he was asked by "Pedro" to make the second trip to San Diego as a favor to "Pedro" [R. T. 91-92]. However, he testified that Emma gave him forty dollars for the second trip to San Diego and that he was supposed to deliver the Buick to Emma in Los Angeles [R. T. 80, 113-14].

Appellant's refusal to name one of his chief companions in the venture was a convincing demonstration of the hollowness of



his position:

"Q. Mr. Rodrigues, referring to the man who is said to have told you to drive the car to Los Angeles, what was that man's name?

"A. I refuse to answer." [R. T. 83].

After the Court compelled the answer, appellant provided the name of "Pedro" [R. T. 84].

Another significant factor was appellant's act of waiting in line at the bus depot and purchasing a bus ticket for his companion [R. T. 139]. Appellant's motive in falsely testifying that he did not even enter the bus depot [R. T. 110] is apparent, because the act of purchasing a bus ticket for "Lalo" (or whatever his name may have been) was inconsistent with appellant's claim that he was merely following the instructions of others, including "Lalo".

In addition to the inconsistencies involving the purpose of appellant's trip and the purchase of the bus ticket, appellant was contradicted by others upon the questions whether he remained in the telephone booth at the lot until "Lalo's" conversation was completed [R. T. 106-09, 159-60]; whether he continued for about one-fourth of a mile while the officers were attempting to stop him by using flashing red lights from two vehicles [R. T. 116, 150]; and whether the brakes of the vehicle were operating properly [R. T. 115-16, 155-58].

There were other weaknesses in the defense. Appellant refused to tell the officers where he was living [R. T. 69]. He joked about the incident of the arrest and said that he was not



driving any car [R. T. 68-69, 128], which was certainly not a normal reaction for a person arrested in a case involving a huge quantity of marihuana. He admitted recent use of an alias while registering at motels [R. T. 89, 121-22]. Appellant's claim that Emma Perez wanted to transfer a 1965 Pontiac to his name is not reasonable [R. T. 89].

In Eason v. United States, 281 F.2d 818 (9th Cir. 1960), marihuana and seconal and amphetamine tablets were found in a vehicle in which two men entered the United States. Both men denied knowledge of the presence of the contraband. They testified concerning their trip from Inglewood, California, to Tijuana, and their activities in Tijuana and return to the border. The opinion contains no hint of any contradiction in their testimony. The only other evidence was the fact that an officer's suspicion was aroused because the defendants appeared to be nervous and because of the defendants' manner in answering questions. The convictions were affirmed.

In Aguilar v. United States, supra, the defendant was caught in a vehicle entering the United States from Mexico with about 98 pounds of marihuana. There, as here, none of the marihuana packages were visible without prying. The defendant claimed to have borrowed the vehicle. He employed the usual "missing man" defense. Whereas the missing people in the instant case were "Pedro", "Lalo", and "Emma Perez", their counterparts in Aguilar were "Salvador" and "Morales". Unlike the instant case, there appear to have been no obvious contradictions





in Aguilar's story. This Court held that the evidence was sufficient:

"There was no direct evidence or admission of knowledge. But out of Aguilar's own words, first, his alibi on arrest and, second, his testimony which followed the line of his alibi, the trial judge, in the full setting here, was entitled to believe the story 'fishy' and to draw affirmative inferences of knowledge. Details about Salvador and Morales were rather unsatisfactory. Also, the court could have concluded that the story about intending to go to his cousin's house was hand made."

Aguilar, supra, at 380-81.

It is respectfully submitted that the evidence in the instant case was more than sufficient to sustain the conviction.

Furthermore, it is questionable whether appellant may raise this issue upon appeal, having failed to renew the motion for judgment of acquittal after presenting evidence following the denial of the motion for judgment of acquittal at the conclusion of the Government case [R. T. 56, 167, 170].

McDonough v. United States, 248 F.2d 725, 727  
(8th Cir. 1957).



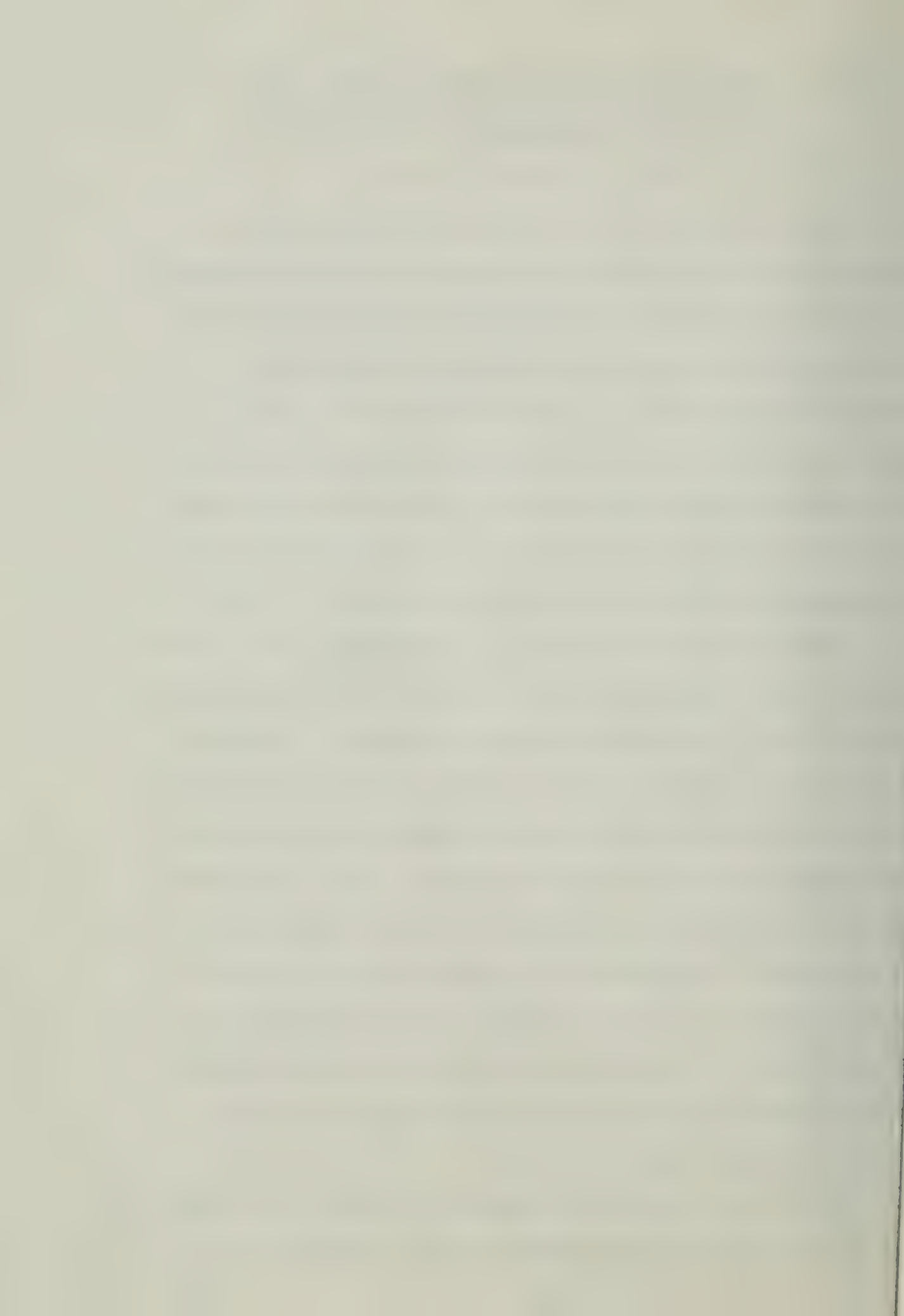
G. THE COURT'S INSTRUCTION UPON THE  
STATUTORY POSSESSION PRESUMPTION  
WAS NOT ERRONEOUS.

---

The trial Court instructed the jury in regard to the statutory presumption arising from possession in marihuana cases (21 U.S.C.A. 176a) [R.T. 207-10, 213]. Appellant contends that this instruction was erroneous because it was "misleading, garbled and unintelligible"; it left it to each juror to convict or acquit in accordance with his own particular notion as to what kind of an explanation would be acceptable; and it was incomplete upon the question whether mere occupancy in the vehicle would establish the presumption (Appellant's Opening Brief, pp. 47, 51, 56).

Appellant relies upon Chavez v. United States, 343 F.2d 85 (9th Cir. 1965). Chavez holds that a similar statutory presumption under 21 U.S.C.A. 174 is a rebuttable presumption. In Chavez, the trial Court erroneously instructed the jury that the defendant's denial of knowledge that the drug was illegally imported would be insufficient to overcome the presumption (at p. 87). In the instant case, the trial Court instructed the jurors that if they believed "the testimony of the defendant to the effect that he did not know that it had been imported from Mexico", then "you should acquit him" [R.T. 210]. Thus the jury was instructed that the presumption was rebuttable and the requirements of Chavez were fully complied with by the Court.

The instruction was not misleading, garbled, or unintelligible. It closely followed the model instructions in 27 F.R.D.



(Instructions 24.08 and 24.09, pp. 168-69), with minor additions and deletion of some material at the suggestion of appellant's counsel [R.T. 102-03, 207-10, 212-13].

Appellant also relies upon dictum in Chavez to the effect that the statutory words, "to the satisfaction of the jury", provide nothing in the way of a standard or guide for the jury, because it is left for each individual juror to convict or acquit in accordance with his particular notion as to what kind of an explanation would be acceptable.

The use of the statutory phrase, "to the satisfaction of the jury", in jury instructions, is not an unusual practice. Jurors were instructed in accordance with this language in Yee Hem v. United States, 268 U.S. 178, 182 (1925); Claypole v. United States, 280 F.2d 768, 770 (9th Cir. 1960); Klepper v. United States, 331 F.2d 694, 702, note 9 (9th Cir. 1964); and Quiles v. United States, 344 F.2d 490, 492 (9th Cir. 1965). The phrase appears in the set of model jury instructions appearing in 27 F.R.D. (Instruction No. 24.08, p. 168), and it also appears in the 1965 Manual on Uniform Jury Instructions in Federal Criminal Cases (Instruction No. 17.01-1, 36 F.R.D. 609). It has been held that failure to instruct the jury in accordance with the second paragraph of 21 U.S.C.A. 174 would have been improper under the facts of Agobian v. United States, 323 F.2d 693, 695 (9th Cir. 1963), 375 U.S. 985 (1964).

Furthermore, since appellant did not object in the trial Court to the manner in which the phrase, "to the satisfaction of the jury", was employed in the instructions [R.T. 102-106, 213-14],





he may not object at this time. "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

Rule 30, Federal Rules of Criminal Procedure  
(emphasis added).

Assuming, arguendo, that the instruction erroneously left the matter to the individual notion of each juror, and assuming that failure to object does not act as a bar to consideration of the new issue in this Court, it is respectfully submitted that any error in this respect would be harmless. Appellant states that it would be left to each individual juror to decide whether the defendant's explanation of possession was satisfactory. However, there would not be a necessity for such a decision, because there was no explanation of possession by the defendant. The presumption involves a knowing possession.

Delgado v. United States, 327 F.2d 641, 642  
(9th Cir. 1964).

Such a possession was denied by appellant [R. T. 83]. "Defendant's denial of knowledge of the contents of the vial and whether its contents were imported was no explanation of possession."

United States v. Kapsalis, 313 F.2d 875, 878  
(7th Cir. 1963), cert. denied,  
374 U.S. 856 (1963).

Appellant also contends that the instruction herein was



incomplete upon the question whether mere occupancy in the vehicle would establish the presumption. The instruction was not incomplete. The jury was informed five times that the presumption applied to "knowledgeable" possession [R. T. 208-10]. In two additional statements, the Court placed great emphasis upon the question of knowledge while instructing the jury [R. T. 209, 212-13]. Consequently, the jurors were thoroughly informed that mere occupancy of the vehicle would not be sufficient.

Furthermore, appellant cannot complain of the failure to give instructions, as he did not comply with Rule 18.2(d) of the rules of this Court: "When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or instructions refused, together with the grounds of the objections urged at the trial." (Emphasis added.)

In order to obtain review of the refusal to give an instruction, the record must show the instruction that was requested.

4A C. J. S. , p. 1300.



VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted  
that the judgment of the District Court should be affirmed.

Respectfully submitted,

EDWIN L. MILLER, JR.,  
United States Attorney,

PHILLIP W. JOHNSON,  
Assistant U. S. Attorney,

Attorneys for Appellee,  
United States of America.





## CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Phillip W. Johnson

PHILLIP W. JOHNSON  
Assistant United States Attorney



BRIEF FOR RESPONDENT

---

---

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

\_\_\_\_\_  
No. 20,678  
\_\_\_\_\_

RICHARD GREVE,

Petitioner,

v.

CIVIL AERONAUTICS BOARD and WILLIAM F. McKEE,  
Administrator of the Federal Aviation Agency,

Respondents.

\_\_\_\_\_  
PETITION TO REVIEW AN ORDER OF THE  
CIVIL AERONAUTICS BOARD  
\_\_\_\_\_

DONALD F. TURNER,  
Assistant Attorney General,

O. D. OZMENT,  
Deputy General Counsel,

HOWARD E. SHAPIRO,  
Attorney,  
Department of Justice,  
Washington, D.C. 20530

WARREN L. SHARFMAN,  
Associate General Counsel,  
Litigation and Legislation,

JOSEPH B. GOLDMAN  
General Counsel,  
Civil Aeronautics Board,  
Washington, D.C. 20428

FREDERIC D. HOUGHTLING,  
PAUL D. GERBER,  
Attorneys,  
Civil Aeronautics Board.

**FILED**

**JAN 25 1967**

WM. B. LUCK, CLERK



INDEXPage

Jurisdictional Statement . . . . .	1
Counterstatement of the Case . . . . .	1
Statutes and Regulations Involved. . . . .	10
Summary of Argument. . . . .	10
Argument . . . . .	11
Introduction. . . . .	11
I. The Board's determination that petitioner's recurrent episodes of paroxysmal arrhythmia (auricular fibrillation) disqualify him for a medical certificate under the Administrator's standards is supported by the record. . . . .	12
II. Petitioner's attack upon the validity of the Administrator's regulatory standard is without merit, and may be beyond the jurisdiction of this Court. . . . .	20
III. There is no evidence that the hearing examiner was biased or prejudged the case. . . . .	25
Conclusion . . . . .	29
Certificate. . . . .	30
Appendix A - Statutes and Regulations involved . . . . .	31
Appendix B - Excerpt from the Board brief in <u>John Doe</u> v. <u>Civil Aeronautics Board</u> , 356 F.2d 699 (C.A. 10, 1966). . . . .	39

CITATIONS

## Cases:

<u>Air Line Pilots Ass'n, International v. Quesada</u> , 276 F.2d 892 (C.A. 2, 1960). . . . .	19,20,22
<u>Carrington v. Civil Aeronautics Board</u> , 337 F.2d 913 (C.A. 4, 1964), <u>cert. denied</u> , 381 U.S. 977 (1965) . . .	21,24

## Cases:

<u>John Doe v. Civil Aeronautics Board</u> , 356 F.2d 699 (C.A. 10, 1966) . . . . .	12,20,21,24
<u>King v. United States</u> , C.A.D.C. No. 19,641 (decided December 21, 1966) . . . . .	14
<u>Nadiak v. Civil Aeronautics Board</u> , 305 F.2d 588 (C.A. 5, 1962), <u>cert. denied</u> , 372 U.S. 913 (1963) . . . . .	12
<u>National Labor Relations Board v. Air Associates, Inc.</u> , 121 F.2d 586 (C.A. 2, 1943) . . . . .	28
<u>United States v. O'Rourke</u> , 213 F.2d 759 (C.A. 8, 1954) . . . . .	28

## Statutes:

Federal Aviation Act of 1958, 72 Stat. 731, as  
amended, 49 U.S.C. 1301, et seq.:

Sec. 313(a) . . . . .	2,31
Sec. 314(b) . . . . .	3
Sec. 601(a)(6) . . . . .	2,31
Sec. 602 . . . . .	2,32
Sec. 609 . . . . .	1,2,3,4,32
Sec. 1005(a) . . . . .	4,33
Sec. 1006(a) . . . . .	1,20,34
Sec. 1006(e) . . . . .	12,34

Longshoremen's & Harbor Workers' Compensation Act,  
42 Stat. 1424, as amended, 49 U.S.C. 901, et seq.

Sec. 902(10) . . . . .	23
------------------------	----

## Regulations:

Civil Aeronautics Board

Procedural Regulations, 14 C.F.R. 300.0, et seq.:

Sec. 301.22 . . . . .	3,38
Sec. 301.50(c) . . . . .	25,38



## Regulations:

Federal Aviation Regulations, 14 C.F.R. 1, et seq.:

Sec. 61.3(c) . . . . .	2
Sec. 61.61(a)(3) . . . . .	2
Sec. 61.81(c) . . . . .	2
Sec. 61.111(c) . . . . .	2,17
Sec. 61.131(a) . . . . .	17
Sec. 61.141(e) . . . . .	2
Sec. 67.13(f) . . . . .	37
Sec. 67.15(f)(2)(i) . . . . .	2,3,5,9,23,35
Sec. 67.17(f)(2)(i) . . . . .	2,5,9,37
Sec. 67.25(b) . . . . .	3

## Miscellaneous:

24 F.R. 2257. . . . .	22
24 F.R. 7309. . . . .	20,23



IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

No. 20,678

---

RICHARD GREVE,

Petitioner,

v.

CIVIL AERONAUTICS BOARD and WILLIAM F. McKEE,  
Administrator of the Federal Aviation Agency,

Respondents.

---

BRIEF FOR THE RESPONDENT

---

JURISDICTIONAL STATEMENT

The jurisdiction of the Civil Aeronautics Board to issue the order here challenged rested on section 609 of the Federal Aviation Act of 1958 (infra, p. 32 ). The jurisdiction of this Court is invoked under section 1006 of the Federal Aviation Act (infra, p. 34 ) which provides for the filing of a petition for review within 60 days after entry of the Board's order. The Board's order was adopted on November 26, and served on November 29, 1965; the petition for review was filed on January 28, 1966.

COUNTERSTATEMENT OF THE CASE

Petitioner seeks review of Civil Aeronautics Board Order S-1324, November 26, 1965 (Tr. 137-151), which affirmed an emergency order of the Administrator of the Federal Aviation Agency (Tr. 8-9) revoking

his second class airman medical certificate. The revocation was based upon petitioner's medical disqualification under the Federal Aviation Regulations, sections 67.15(f)(2)(i) and 67.17(f)(2)(i) (infra, p. 35), in that petitioner had recurrent episodes of paroxysmal arrhythmia (auricular fibrillation), a disorder of the heart, which in the Administrator's judgment rendered him unable safely to exercise the privileges of his airman's certificate.

The Administrator of the Federal Aviation Agency is charged by the Federal Aviation Act of 1958 (49 U.S.C. 1301, et seq.) with prescribing and administering standards and regulations governing the safety of flight. Pursuant to this charge, the Administrator prescribes the standards to be met by applicants for airmen certificates, including standards of physical fitness, and issues such certificates (sections 313(a), 601(a)(6), and 602, infra, pp.31-32 ). In order to fly, an airman must have both a pilot and a medical certificate of the appropriate class (Federal Aviation Regulations, section 61.3(c), 14 C.F.R. 61.3(c)); <sup>1/</sup> the medical certificate is regarded as a separate "airman certificate" within the statutory sense.

Section 609 of the Act (infra, p. 32) permits the Administrator to revoke or suspend an airman certificate if, after investigation, "he

---

<sup>1/</sup> The Administrator has provided for three classes of medical certificates: a Class 1 certificate required of airmen with airline transport pilot certificates (14 C.F.R. 61.141(e)); a Class 2 certificate required of airmen with commercial pilot certificates (14 C.F.R. 61.111(c)); a Class 3 certificate required of airmen with private pilot or student pilot certificates (14 C.F.R. 61.81(c), 61.61(a)(3)).

determines that safety in air commerce or air transportation and the public interest requires" such action. Section 609 further provides that the airman may appeal such action by the Administrator to the Board for de novo consideration. The Administrator is required to establish before the Board that the certificate should be revoked or suspended, and the Board may modify or reverse the Administrator's order if it finds that air safety and the public interest "do not require affirmation." The Board's rules specify that "in proceedings under section 609 of the Act, the burden of proof shall be on the Administrator" (section 301.22, infra, p. 38).

On August 20, 1964, petitioner was issued a second class medical certificate by a designated FAA medical examiner (Tr. 8)<sup>2/</sup> pursuant to section 67.15 of the Federal Aviation Regulations (infra, p. 35). This section lists standards which must be met by the airman to qualify for a second class medical certificate. The list includes standards of visual and aural acuity and sets forth certain medical conditions which

---

<sup>2/</sup> Medical certificates are issued throughout the country by physicians who have been designated FAA medical examiners by the Administrator. If the airman is deemed by him qualified, the medical certificate is issued by the physician, under delegated authority, immediately following his examination of the airman. These certificates are then subject to review and reconsideration by the Administrator (F.A.R., section 67.25(b), 14 C.F.R. 67.25(b); section 314(b) of the Act, 49 U.S.C. 1355(b)). The Administrator may then, as he did in this case, notify the airman that he does not meet the medical standards and revoke the certificate originally issued by the examiner.

Petitioner asserts that he had fully disclosed his condition to the medical examiner when he applied for the medical certificate (Pet. Br. 4). The record does not, however, show this. In any event, the action of the field examiner is subject to the review noted above by the Administrator's medical experts.



are disqualifying: e.g. disturbance in equilibrium, psychotic disorder, chronic alcoholism, drug addiction, epilepsy, history or clinical diagnosis of myocardial infarction or angina pectoris. The regulation concludes with a section which covers general medical conditions, as follows:

"(f) General medical condition:

\* \* \* \* \*

(2) No other organic, functional, or structural disease, defect, or limitation that the Civil Air Surgeon finds --

(i) Makes the applicant unable to safely perform the duties or exercise the privileges of the airman certificate that he holds or for which he is applying;

\* \* \* \* \*

and the findings are based on the case history and appropriate, qualified, medical judgment relating to the condition involved."

3/

On March 18, 1965, the Administrator issued an emergency order, revoking that medical certificate on the ground that petitioner had suffered recurrent episodes of paroxysmal arrhythmia (auricular fibrillation), a disorder of the heart, which made him unable to safely perform the duties or exercise the privileges of his airman certificate consistent with safety in air commerce (Tr. 8), and therefore disqualified him under

---

3/ Sections 609 and 1005(a) (*infra*, pp. 32-33) provide for emergency procedures under which the suspension or revocation takes effect immediately upon issuance of the order when the Administrator determines that safety in air commerce requires such action. In such emergency proceedings, the Administrator's order is not stayed upon appeal to the Board, but remains in effect until the Board orders otherwise. In the instant proceeding the parties waived certain of the procedures, including time limitations, normally applicable to review of an emergency order (Tr. 88-91).



sections 67.15(f)(2)(i) and 67.17(f)(2)(i) of the Federal Aviation Regulations.

Petitioner appealed this revocation to the Board, and an evidentiary hearing was held before a Board examiner on March 30, 1965 (Tr. 16) and July 15, 1965 (Tr. 83). At the opening of the hearing, petitioner stipulated that he had suffered recurrent episodes of paroxysmal arrhythmia (auricular fibrillation) (Tr. 21). The only issue remaining for determination, therefore, was whether this condition disqualified petitioner under the regulations from holding his medical certificate.

In support of his contention that petitioner's condition was disqualifying, the Administrator offered the testimony of Dr. Edwin E. Westura, an expert cardiologist and a medical officer of the Office of Aviation Medicine of the FAA. Dr. Westura described paroxysmal arrhythmia (auricular fibrillation) as a condition which causes a "grossly irregular or chaotic beating of the heart" (Tr. 25). The particular form of fibrillation with which the petitioner is afflicted occurs in unexpected episodes or attacks. An attack is initiated at an irritable focus in the heart which directs nerve impulses at the rate of 300 to 400 per minute at the upper chambers of the heart (known as the atria or auricles). The impulses continue through the atria to barrage the lower chambers of the heart (known as the ventricles). At this point the body's defensive system normally reduces the impact of these impulses so as to create a heart beat of only 150 to 180 beats per minute, as opposed to the 300 to 400 impulses with which it is barraged. This heart beat is, however, still significantly greater than the normal heart beat of 60 to 100 per

minute. (Tr. 25-29). Describing the reaction of the heart to such an attack Dr. Westura stated: "if you can look at the heart, it looks like a bag of worms contracting. There is no regularity to it, no rhythm or rhyme or reason to it at all" (Tr. 27).

Dr. Westura then described the functional changes in the body which result from attacks of this sort:

"There are four major functional changes which take place as a result of this. The main functional change is a decrease in the amount of blood which the heart can pump per minute. This is called a decrease in the cardiac output.

"The second change is a result of the decrease in the cardiac output or in the amount of blood which the heart pumps per minute and this is the result of the decrease in other areas of the body so that this fall in the amount of blood flow occurs in the heart, in the kidneys, in the brain, in the central nervous system and this produces secondary effects.

"A third major effect, if not controlled or treated, this condition can result in failure of the heart.

"The fourth and final complication is rare; because there is this irregular chaotic beating of the atria, blood can coagulate or clot within the atria and these clots can be carried to other portions of the body as emboli and these could produce similar secondary effects." (Tr. 29)

Based upon his experience with paroxysmal arrhythmia (auricular fibrillation), which included seeing two to three patients per week at Georgetown University Hospital with this condition (Tr. 49), and the descriptions of petitioner's particular condition set forth in statements submitted by petitioner to the Administrator (Administrator's Exhibits 1

and 2, <sup>4/</sup> Tr. 75-77), Dr. Westura described how petitioner would be unable to safely perform the duties of an airman within the meaning of the regulations. First, the normal decrease of oxygen during flight conditions would increase the possibility of an attack of paroxysmal arrhythmia and, of course, would aggravate the functional changes occasioned by the decrease in oxygen supplied to the body as a result of the attack (Tr. 35-36). Second, the attacks suffered while piloting a plane could precipitate several uncontrollable, subconscious reactions such as fear, anxiety, anger, hyperventilation, and other compensatory responses which might further aggravate the overall results of the disorder of the heart beat itself (Tr. 37). Third, change in blood flow brought about by an attack could result in serious inability to make judgments and decisions required in the proper exercise of aircraft control (Tr. 37). Finally, the sensation of heart palpitation experienced during an attack could be severely distracting while piloting an aircraft (Tr. 38).

In sum, it was Dr. Westura's opinion that an attack of the sort which petitioner was subject to could create conditions that "would be very dangerous in flying an airplane in terms of safety" (Tr. 40-41).

Petitioner called as his only witness Dr. William A. Kornblum.<sup>5/</sup>

---

<sup>4/</sup> Exhibit 1 is a written statement of the Head of Cardiology, San Diego Naval Hospital, Dr. W. S. Myers, setting forth a medical history of petitioner's heart condition (Tr. 75). Exhibit 2 is an undated written statement by the petitioner further outlining his condition (Tr. 77).

<sup>5/</sup> Dr. Kornblum was one of a large number of medical examiners designated by the FAA throughout the country to make an initial determination of the airman's qualifications. Such a determination is routinely subject to review by the Civil Air Surgeon under procedures indicated, supra, p. 3, note 2.



Dr. Kornblum's only testimony was that he had examined petitioner on August 20, 1961, found him fit for flying private aircraft, and issued the medical certificate here in question (Tr. 57). The witness was asked no questions and volunteered no information regarding petitioner's heart condition (Tr. 56-57).

At this juncture, after the Administrator had presented his case and petitioner had failed to offer any evidence concerning the effect of his disability, the examiner suggested to him that he needed the testimony of a qualified medical witness to support his contention that, in spite of such condition, he was not unqualified to hold a medical certificate. (Tr. 62). Petitioner thereupon attempted to offer into evidence a letter dated March 29, 1965, from Dr. David B. Carmichael, a heart specialist. Dr. Carmichael, however, was not present and the examiner sustained the Administrator's objection to the admission of the letter on the ground that it was hearsay (Tr. 62, 72). The examiner called a short recess so that petitioner might attempt to arrange for Dr. Carmichael's testimony. When this proved unsuccessful the examiner suggested, and all parties agreed, that the hearing be continued until such time as petitioner was able to obtain qualified medical testimony (Tr. 70).

The hearing was reconvened three and one-half months later. At this hearing petitioner was represented by counsel. He declined to offer further testimony and asked only that the letter of Dr. Carmichael which had previously been denied admission be attached to the record for

possible appeal purposes.<sup>6/</sup> His counsel then stated "we will offer no further evidence" (Tr. 88).

On August 4, 1965, the examiner issued his initial decision in which he found "that by reason of [petitioner's] recurrent episodes of paroxysmal arrhythmia the Civil Air Surgeon may reasonably find that [petitioner] is unable to safely perform the duties or exercise the privileges of an airman" (Tr. 98). The examiner, therefore, ordered that the Administrator's emergency order of revocation be affirmed.

Petitioner appealed to the Board on three grounds: first, that the Administrator had failed to sustain his burden of proof; second, that an unbiased hearing officer has not been provided; and, finally, that the regulation under which petitioner was disqualified did not provide enforceable standards (Tr. 108).

The Board reviewed the record in its opinion, included detailed findings on the testimony of Dr. Westura and Dr. Kornblum and petitioner's medical history, and concluded that "it is clear from the above that the preponderance of the evidence supports the finding under sections 67.15(f)(2)(i) and 67.17(f)(2)(i) of the F.A.R. that respondent has a disease which makes him unable to safely perform the duties or exercise the privileges of the airman certificate that he holds and we conclude that the Administrator has met the burden of proof" (Tr. 41-42). The Board further found that "the contention that the examiner prejudged the

---

<sup>6/</sup> Petitioner has not, however, alleged error concerning this letter in his appeal to either the Board or this Court.

case is completely without merit" (Tr. 143). As to petitioner's challenge to the Administrator's regulation, the Board stated that it was without power to pass on the validity of such regulations (Tr. 143).

#### STATUTES AND REGULATIONS INVOLVED

The provisions of the Federal Aviation Act, the Federal Aviation Regulations, and the Board's procedural regulations principally involved are set forth in Appendix A, infra, p. 31.

#### SUMMARY OF ARGUMENT

##### I

The Board properly found petitioner unqualified under the regulations to hold a medical certificate, a finding clearly supported by substantial evidence. The basic facts are not in dispute, since petitioner admits that he has had recurrent attacks of paroxysmal arrhythmia (auricular fibrillation). The only evidence in the record as to the probable future course of petitioner's heart condition and the hazards to air safety involved is that of the Administrator's expert medical witness, who testified, on the basis of his own experience and petitioner's medical record, that an attack while petitioner was flying a plane was entirely possible and that the consequences of such an attack would be "very dangerous . . . in terms of safety" (Tr. 40-41). Petitioner's statement to the Administrator and the medical expert's detailed coverage of the consequences and possibilities of further attacks upon petitioner form an adequate basis for the Board's determination that petitioner suffers from a condition which makes him "unable to safely perform the duties or exercise the privileges of the airman certificate that he holds."



## II

Petitioner's attack on the validity of the Administrator's regulation cannot be sustained. First, the question of validity need not be reached by the court -- it is doubtful whether the court has jurisdiction to consider the question, and in any event the petitioner's attack so lacks substance that it may be dismissed as specious. Second, if the court does undertake to consider the validity of the regulation, it is plainly reasonable, provides adequate standards, and is within the scope of the Administrator's statutory authority.

## III

Petitioner's charges of bias on the part of the hearing examiner are wholly without merit. The evidence relied upon by petitioner to support his charges shows only that the examiner was attempting to assist petitioner when he was not represented by counsel. Moreover, so far as the examiner's comments evidence any view on the merits they are still quite proper, since they were offered at the conclusion of the hearing when both parties had indicated that they had no further evidence -- at a time, in other words, when the Board's Procedural Regulations called for the examiner to express his final determination on the merits in the form of an oral initial decision.

## ARGUMENT

### Introduction

The issue in this case is whether petitioner's admitted heart disorder disqualifies him from holding an airman medical certificate. In a routine review, the Administrator and his medical experts determined, upon information submitted by petitioner, that the condition was

disqualifying. When petitioner appealed to the Board, the Administrator offered the testimony of an expert cardiologist who described the dangers to air safety of petitioner's condition. Petitioner offered no evidence in rebuttal although he was afforded a postponement of three and one-half months to do so. Instead, after employing counsel, he has avoided showing his own qualifications but has limited himself to legal attacks on the regulations, the medical expert, and the hearing examiner, who tried to protect petitioner before he had counsel. For this reason, the court will quickly observe that the Board's findings are supported by substantial evidence and must be sustained. Section 1006(e) of the Act (*infra*, p.34 ); John Doe v. Civil Aeronautics Board, 356 F.2d 699 (C.A. 10, 1966); Nadiak v. Civil Aeronautics Board, 305 F.2d 588, 592 (C.A. 5, 1962), cert. denied, 372 U.S. 913 (1963). It will likewise quickly appear that the make-weight "legal" arguments, which create a diversion from petitioner's lack of medical qualification, are specious.

- I. The Board's determination that petitioner's recurrent episodes of paroxysmal arrhythmia (auricular fibrillation) disqualify him for a medical certificate under the Administrator's standards is supported by the record.

Petitioner argues that the Board erred in finding that the Administrator had sustained his burden of proof. He states first that the evidence offered by the Administrator was not sufficient to establish his case and, second, that petitioner's statements, contained in the Administrator's exhibits, that he was able to control his attacks served to adequately refute any showing of disqualification made by the Administrator. Indeed, he suggests that he was required to establish that

he was medically qualified, rather than the Administrator being required to establish that he was unqualified. An examination of the evidence shows clearly, however, that the burden was not placed upon petitioner and that the Administrator overwhelmingly sustained his burden of proof.

The record is clear that petitioner has a long history of heart ailment. In two statements he submitted to the Administrator, petitioner describes numerous attacks commencing in 1958, some lasting as long as one hour and causing lightheadedness and an uncomfortable feeling (Tr. 75, 77). Recognizing the seriousness of the attacks petitioner gave up flying, began taking digitalis, adopted a sedentary life and began dieting. At the opening of the hearing, petitioner stipulated to the fact that he had had recurrent episodes of paroxysmal arrhythmia (Tr. 21); this fact was therefore not at issue. The Administrator then proceeded to offer the testimony of Dr. Edwin E. Westura, an expert <sup>7/</sup>cardiologist. He described the disorder known as paroxysmal arrhythmia

---

<sup>7/</sup> Petitioner's attack (Pet. Br. 4) on Dr. Westura's qualifications as an expert is based upon a misleading statement concerning Dr. Westura's certification by the American College of Physicians to the Board of Internal Medicine. Albeit Dr. Westura had not been certified at the time of the hearing, he clearly stated, in response to petitioner's query, that he was Board-eligible and had completed Part One of his examination and was scheduled to take Part Two shortly after the hearing (Tr. 41).

Among the credentials offered by Dr. Westura to establish himself as an expert in cardiology were the following: served in the Air Force as an internist and cardiologist; National Institute of Health, fellow in cardiology; Chief of the Cardiovascular Laboratory at the Georgetown Clinical Research Unit of the FAA; Executive Officer of the Department of Medicine and a member of the Division of Cardiology of the Georgetown University Hospital; and, at the time of the hearing, engaged in research  
(footnote continued)



(auricular fibrillation) and detailed the effects of an attack both generally and specifically as to petitioner.

Dr. Westura first described, in layman's terms, what occurs during an attack of paroxysmal arrhythmia: the increased barrage of impulses to the heart, the heart's defensive reaction, and the resultant increased and arrhythmical heartbeat (Tr. 26-28).<sup>8/</sup> He then went on to describe the four major functional changes that occur in the body when one is subject to an attack of this "grossly irregular or chaotic beating of the heart" (Tr. 25): first, a decrease in cardiac output, i.e., the amount of blood which the heart can pump; second, the resultant decrease in the amount of blood flow to the vital areas of the body, such as the brain, the central nervous system, and the kidneys; third, if

---

in cardiovascular disease as it pertains to the problems of civil aviation (Tr. 23-24).

In view of Dr. Westura's qualifications and the fact that petitioner offered no contrary medical testimony, his attack on Dr. Westura's qualifications because he was not yet certified to the Board of Internal Medicine is completely without merit. See King v. United States, C.A.D.C. No. 19,641 (decided December 21, 1966), slip opinion, p. 25, wherein the court stated:

"Assuming that the prosecutor acted properly in eliciting testimony defining the witnesses' qualifications, we see no warrant in this case for his stressing to the jury, through summation, that the testifying psychiatrists were not diplomats where there was no contrary psychiatric testimony. The argument carried the implication that a more experienced expert might or would have reached a different conclusion. If there was any basis for such an implication it should have been adduced in the form of testimony presented by the Government, which had the burden of proof."

<sup>8/</sup> A more detailed description of the attack is set forth in the Counterstatement, supra, pp. 5-6.

the attack is not controlled "this condition can result in failure of the heart"; finally, on rare occasions, the piling up of the blood in the heart can result in the release of emboli (blood clots) into the blood stream (Tr. 29-30).

Following this general discussion, Dr. Westura turned specifically to petitioner's medical history and the probable effect an attack would have upon petitioner. The Administrator introduced into evidence (Tr. 31-32) certified copies of documents submitted to the FAA by the petitioner concerning his history of attacks. Exhibit 2 (Tr. 77) is a statement by petitioner, submitted subsequent to his application for the medical certificate, which described his attacks. Dr. Westura particularly noted petitioner's statements that the condition was first discovered in 1958 at a physical examination, that petitioner had suffered two attacks which had lasted about one hour each and made him feel uncomfortable and lightheaded, and subsequent episodes of a few seconds duration (Tr. 32-33). Exhibit 1 (Tr. 75) is a statement submitted by the Head of Cardiology of the San Diego Naval Hospital concerning his observations of petitioner over a twenty-three month period prior to December, 1964. Dr. Westura found of significance in this report the statements that petitioner had admitted to recurrent attacks and had stated that he was able to control these attacks by physical relaxation and a modified Valsalva maneuver <sup>2/</sup> (Tr. 33). He also noted that an attack

---

<sup>2/</sup> Dr. Westura described the Valsalva maneuver as a "forced expiration against the closed glottis" (Tr. 38).

had been recorded on a electrocardiogram taken at the clinic.

Based upon these statements submitted by petitioner, Dr. Westura concluded that petitioner "does have a serious medical condition" (Tr. 34). He then went on to relate petitioner's condition to his ability to safely perform the duties of an airman within the meaning of the regulation. First, he noted that the normal decrease of oxygen during flight conditions would increase the possibility of an attack (Tr. 35-36). Second, an attack occurring during operation of a plane could precipitate several uncontrollable subconscious reactions, such as fear, anxiety, anger, hyperventilation, and other compensatory responses which might further aggravate the condition (Tr. 37). Third, "changes in the blood flow could result in serious inability to make judgments and to make decisions, required for the proper exercise of aircraft control" (Tr. 37). 11/ Finally, the sensation which the petitioner stated he felt during an attack, i.e., irregular palpitations, could be a very distracting experience while piloting an aircraft (Tr. 38). Dr. Westura concluded that loss of control of the aircraft could be the result of an attack (Tr. 38), and that the consequences of an attack "would be very dangerous" in flight (Tr. 40-41).

---

10/ Evidence of an attack can be recorded on an electrocardiogram (EKG) only if the attack occurs during the taking of the EKG. An EKG taken at any time subsequent to the attack will not show the irregularities which occurred during the attack.

11/ This is particularly significant in view of petitioner's admission that he suffered one hour periods of "lightheadedness" during attacks (Tr. 77).



In answer to this rather overwhelming evidence that petitioner was not qualified under the regulations, the petitioner offered nothing. He offered no expert testimony that the consequences of an attack would be other than as stated by Dr. Westura, or that he, for some reason, would not suffer these particular consequences. The only medical testimony he offered was a statement by an FAA medical examiner (not a cardiac specialist) that on the date he issued petitioner his medical certificate he considered petitioner fit for flying private aircraft (Tr. 57).<sup>12/</sup> Nor did he himself testify concerning his experience with these attacks. To overcome the Administrator's evidence petitioner relies on a statement in Dr. Myer's letter (Administrator's Exhibit 1, Tr. 75) to the effect that he (petitioner) had stated to Dr. Myers that he was able to control the attacks by physical relaxation and a modified Valsalva maneuver.<sup>13/</sup>

---

<sup>12/</sup> The second class medical certificate which the Administrator revoked together with the appropriate airman certificate would allow petitioner to operate commercial aircraft (F.A.R., section 61.111(c)). Although petitioner did not at the time hold a commercial pilot certificate, there would be no medical basis for withholding the certificate if petitioner's contentions as to his medical qualifications were upheld. With a commercial certificate an airman may act as a pilot in command of an aircraft carrying passengers or property for hire (F.A.R., section 61.131(a)).

<sup>13/</sup> Petitioner also places some emphasis upon a statement made by him in his letter to the FAA (Administrator's Exhibit 2, Tr. 77) that a Naval medical board had declared him fit for the actual control of aircraft in "Service Group 1 (highest)" (Pet. Br. 5). No evidence was offered concerning the examination or requirements for this "Service Group 1"; nor would such evidence be of any significance. A seven-year old physical could hardly be considered refutation of a determination by the Administrator that petitioner could not currently meet the medical standards of the Federal Aviation Regulations. In any event, a definite change in petitioner's medical condition was evidenced by three hour-long attacks subsequent to the Navy medical board determination (Tr. 77).

This could hardly be considered an answer to the Administrator's evidence even if petitioner had offered some substantive evidence to support his argument. Dr. Westura testified that one of the consequences of an attack would be a "serious inability to make judgments and to make decisions required for the proper exercise of aircraft control" (Tr. 37). Even if petitioner does have the physical ability to ultimately control an attack, short of actual heart failure, this does not serve to mitigate the dangers inherent in a loss of the ability to make judgments and decisions while at the controls of a plane. When an airman is operating a plane at a busy airport where he must be on the alert for other aircraft, accept directions from the airport control tower, maintain a watch on his plane's instruments, maintain control of the plane, and accept weather reports, safety in the air demands that the airman not be subject to lapses in his ability to make judgments. Moreover, even if the airman were able to control his judgment during such an attack by a sudden complete relaxation and the execution of a modified Valsalva maneuver,<sup>14/</sup> safety in the air would be subject to the same dangers by this lapse in physical capability as it would from a lapse in ability to make judgments. Petitioner, himself, recognized the seriousness of these

---

<sup>14/</sup> The only evidence in the record concerning the effect of a Valsalva maneuver is that offered by Dr. Westura. He stated:

"First of all, I have never found these simple measures in my experience to be effective in controlling arrhythmia fibrillation, and secondly, I think the amount of valsalva that might be necessary to prevent or abort an attack if one did occur could produce further decreases in blood flow, because the natural response of the valsalva is to decrease the amount of blood that returns to the right side of the heart." (Tr. 40).

attacks when, as he stated in his letter, he "voluntarily gave up flying in my 20th year of flying" (Tr. 77).

Petitioner also asserts that the Administrator's evidence is inadequate because it "certainly does not prove that flying will have anything to do with Mr. Greve's problem, or will precipitate it" (Pet. Br. 7). First, the uncontradicted testimony of Dr. Westura indicates that the attacks are more likely to occur and are likely to be more severe in the air than on the ground (Tr. 35-36). Second, whether these seizures are more likely to occur in flight than on the ground, is not a controlling factor. The Administrator's determination that petitioner was unable to safely perform the duties or exercise the privileges of his airman certificate was based upon a consideration of the potential consequences of an attack together with the possibility of an attack while petitioner is piloting a plane. Petitioner's history of attacks -- three of one hour's duration and numerous shorter attacks -- presents adequate proof of the possibility of future attacks and the creation of a hazard to safety in the air.

No finding was made in terms of percentage or probability of petitioner having an attack while piloting an aircraft; nor was such a finding required. Air Line Pilots Ass'n, Int'l v. Quesada, 276 F.2d 892, 898 (C.A. 2, 1960). Rather, the expert Administrator must exercise his discretion in light of the facts before him and make a determination in the interest of safety whether petitioner's presence in the air would create a significant risk.



All of the evidence points to the dangers inherent in allowing an airman with paroxysmal arrhythmia, specifically petitioner, to pilot an aircraft. The regulations clearly provide for disqualification for one with petitioner's history which "may reasonably be expected to result in a condition which would in fact be disabling for safe flying." (24 F.R. 7309, 7311 (1959)).

II. Petitioner's attack upon the validity of the Administrator's regulatory standard is without merit, and may be beyond the jurisdiction of this Court.

In its order the Board noted that its power of review under the Act does not extend to a determination of the validity or wisdom of the regulations of the Administrator (Tr. 143). (This position was noted with apparent approval in John Doe v. Civil Aeronautics Board, 356 F.2d 699, 700.) The basis for this position is discussed in Appendix B, infra, pp. 39 - 48 . It also has been the Board's position before the courts that review of the validity of the Administrator's regulations is not available in an appeal from a Board order under section 1006(a) (infra, p. 34 ), but may only be reviewed in a suit in the district court directly challenging the regulation. See e.g., Air<sup>15/</sup>  
Line Pilots Ass'n, Int'l v. Quesada, 276 F.2d 892 (C.A. 2, 1960).

---

<sup>15/</sup> We have appended to this brief an excerpt from the Board brief in John Doe v. Civil Aeronautics Board, 356 F.2d 699 (C.A. 10, 1966), setting forth the Board position as to the jurisdiction of this Court to consider the validity of the Administrator's regulations in a section 1006 appeal such as this. Appendix B, infra, pp. 39-48. As in John Doe (infra, p. 48) , the Department of Justice reserves its position on this issue.

This latter question has been twice considered by the courts, in John Doe v. Civil Aeronautics Board, 356 F.2d 699 (C.A. 10, 1966) and Carrington v. Civil Aeronautics Board, 337 F.2d 913 (C.A. 4, 1964), cert. denied, 381 U.S. 927 (1965). In both cases the Board urged that such review was not available, but that, in any event, the regulations were so patently valid that the jurisdictional question need not be reached. In Carrington, the court found, as the Board urged alternatively, that the challenge to the regulation was "so lacking in substance" as not to require it to reach the jurisdictional question. In contrast, in John Doe the court considered that the question of validity could be considered by the Court (as distinguished from being considered by the Board), as an incident to review of a Board order applying the regulation.

Our position remains the same as in the Carrington and John Doe cases (see Appendix B, infra, pp. 39-48). In this case, as in Carrington, we submit that the attack on the Administrator's regulation is so lacking in substance as to justify dismissal without consideration of the jurisdictional issue.<sup>16/</sup> If, however, this Court should consider that a substantial question of validity is presented and should assume jurisdiction to review, we submit that it must also, as did the court in John Doe, sustain the Administrator's regulation as valid.

---

<sup>16/</sup> The Court said that petitioner's "contention that [the regulations] are unconstitutionally vague and otherwise invalid are so lacking in substance, however, that we need not consider whether or not such questions are properly before us." (337 F.2d at 917 ).

That the instant regulation was properly promulgated by the Administrator pursuant to his statutory authority is not questioned. Airline Pilots Ass'n, Int'l v. Quesada, 276 F.2d 892 (C.A. 2, 1960). Petitioner's attack is directed solely to the question of whether the regulation provides a sufficiently definite or certain standard for action. It is important, first, to note that this is not a regulation designed for the guidance of airmen, but rather for the guidance of medical experts in determining whether the airman is suffering from a disorder that makes him "unable to safely perform the duties or exercise the privileges of the airman certificate that he holds or for which he is applying."

Secondly, the overall regulations are not, as petitioner would have it, carte blanche authority to physicians to disqualify an airman pursuant to their whim. The medical regulations, including the instant one, were adopted following an extensive study of desirable medical standards under a special appropriation by Congress. Out of that study, conducted by the Flight Safety Foundation, Inc., came a number of recommendations to add certain specified conditions to the list of those which are disqualifying. 24 F.R. 2257 (1959). All conditions are not as susceptible of definition, listing or precise measurement, however, as are visual acuity, history of myocardial infarction, epilepsy, or drug addiction. A general medical condition regulation was, therefore,



17/ included. It provided as definitive a standard for its application as is possible under the circumstances: the inability of the airman 18/ to safely perform his functions. It also provided the specific basis upon which such a finding is to be grounded: "the case history and appropriate, qualified medical judgment relating to the condition

---

17/ "(f) General medical condition:

\* \* \* \* \*

(2) No other organic, functional, or structural disease, defect, or limitation that the Civil Air Surgeon finds --

(i) Makes the applicant unable to safely perform the duties or exercise the privileges of the airman certificate that he holds or for which he is applying;

\* \* \* \* \*

and the findings are based on the case history and appropriate, qualified, medical judgment relating to the condition involved."

18/ The Administrator stated in the preamble to these regulations:

"The standard of ability to perform the duties or to exercise the privileges of an airman certificate has been retained as a necessary measure of the significance of the disability. To eliminate the possibility of considering minor deficiencies as disabling under this standard, the standard is now limited to such deficiencies which are or may reasonably be expected to result in a condition which would in fact be disabling for safe flying. The Civil Air Surgeon is charged with the duty of finding whether such a condition exists or may result, but his findings may be made only on the basis of professionally qualified medical judgment and only in relation to the individual's condition involved." 24 F.R. 7309, 7311 (1959).

The standard of "disability" to perform a function is one used in a variety of situations in the law. See, e.g., Longshoreman's & Harbor Worker's Compensation Act, 33 U.S.C. 902(10).

involved."<sup>19/</sup> As was held in John Doe, which rejected a similar contention of vagueness, the question of whether the condition from which the airman suffers is severe enough to be disqualifying "lies in the realm of competent proof."<sup>20/</sup>

In sum, the instant regulation does not provide the Administrator with a tool for arbitrary action, as petitioner asserts. If a medical certificate is denied or revoked under the regulation the airman may appeal to the Board where the Administrator must support his action by convincing evidence adduced at a full and fair hearing; and even then the determination of the Board is subject to review by the courts. Thus, not only are the standards of the regulation sufficiently clear, but there are numerous safeguards in their application to individual airmen. The regulation thus is clearly within the scope of the Administrator's power to fix physical standards for issuance of airman's certificates, is directly related to safety in air commerce, is legally sufficient in terms of standards, and is surrounded by the additional safeguards of Board and court review. Plainly, therefore, the regulation is valid.

---

<sup>19/</sup> Petitioner argues that, under this regulation, a headache could be disqualifying. Indeed, if the Administrator's medical expert determined, based upon a particular case history and the expert's appropriate, qualified medical judgment, that an individual airman was unable to safely perform the functions of his airman certificate because of persistent headaches, such a condition would be disqualifying.

<sup>20/</sup> As previously noted, an earlier attack on the same regulation and on the same grounds was dismissed as totally lacking in substance. Carrington v. Civil Aeronautics Board, 337 F.2d 913 (C.A. 4, 1964), cert. denied, 381 U.S. 977 (1965).

III. There is no evidence that the hearing examiner was biased or prejudged the case.

Petitioner's allegations that the hearing examiner prejudged the case is wholly lacking in substance. His attack is based solely on a number of statements made by the examiner at the conclusion of the hearing (when petitioner was not represented by counsel) indicating the examiner's view that petitioner needed a medical witness to "complete his case." First, even if these comments were construed as an indication by the examiner of his judgment, they do not show prejudice or bias; and, second, if the comments show anything they show a disposition favorable to petitioner rather than against him.

The comments were made at the end of the hearing, after both the Administrator and petitioner had indicated that they had no further evidence to offer. Under the Board's Procedural Regulations, it is proper for the examiner at this point to set forth his determination on the merits in the form of an oral initial decision.<sup>21/</sup> As the Board observed:

"The record is clear that the examiner expressed no judgment on the merits of the case until after the evidence was in. Indeed, the examiner instead of suggesting and allowing a continuance for the benefit of the [petitioner] properly could have, pursuant to section 301.50(c) of the Rules of Practice, issued an oral initial decision at that time on the record then before him. The contention that the examiner prejudged the case is completely without merit" (Tr. 143).

---

<sup>21/</sup> Procedural regulations, section 301.50(c) (infra, p. 38). It was not until later that this procedure was waived by both parties (Tr. 88-91).

Because the examiner did not render his decision at this time, but instead attempted to aid petitioner, indicated his willingness to go to great lengths to facilitate the petitioner in the presentation of his case, and even postponed the hearing for three and one-half months to allow him to obtain further testimony, petitioner now charges that the hearing examiner was biased and prejudged the case.

In addition to the lack of any evidence of "prejudgment", an examination of the comments themselves clearly shows a lack of any bias against petitioner. Petitioner reads into the comments an indication by the examiner that he had improperly shifted the burden of proof from the Administrator to petitioner. A reading, even of the excerpts presented by petitioner, belies this contention. The Administrator had offered extensive testimony to establish the allegations in his complaint and the examiner advised petitioner, who was not at that time represented by counsel, that it would be in his interest to present some evidence or testimony in defense. At most, the examiner was merely telling petitioner that the Administrator had sustained his burden of going forward with the evidence and that, without further evidence from petitioner, he would immediately issue his oral initial <sup>22/</sup> decision finding against petitioner.

---

<sup>22/</sup> This is somewhat analogous to a situation where a defendant moves to dismiss at the conclusion of the plaintiff's case on the ground that plaintiff has failed to sustain his burden of proof. At this point, the trial judge must express his judgment on whether the plaintiff has sustained his burden or not. If he denies the motion, he is in a sense stating to the defendant that he must offer some evidence to "support his case" -- i.e., present a case in defense.



The conclusion of the interchange which petitioner claims proves his charge of bias can perhaps best serve to put that charge to rest:

"Hearing Examiner: Let me now see if I can summarize the substance of our conversation. It has been recognized that Mr. Greve requires the testimony of a qualified medical witness and such a witness is not available at this time, and as Examiner in this case, I have suggested to Mr. Greve that he request the case to be continued until he is able to produce a qualified medical witness.

\* \* \* \* \*

"Accordingly, it has been proposed to Mr. Greve that this case be continued indefinitely and the case will be set for further hearing when Mr. Greve has advised me as the Examiner that he does have a qualified medical witness available to testify and when the case can be heard along with another medical case in this general Southern California area which would necessitate Mr. Schmerer or someone else from his office coming from Washington out here for that purpose.

"Mr. Greve has also stated that there is a possibility that he may be in the Washington, D. C., area and that he would be able to produce a qualified medical witness there and in that event it has been represented to Mr. Greve by myself that the case would be set to meet his convenience and the convenience of his witness, it being understood, of course, he would give us reasonable notice of a week or two. I understand that this is all satisfactory with you, Mr. Greve.

"Mr. Greve: Yes.

"Hearing Examiner: This represents what you wish to be done in your case?

"Mr. Greve: It is very satisfactory." (Tr. 70-71)

Obviously this shows only an abundance of care for petitioner's interests in addition to petitioner's complete satisfaction with the

23/

assistance given him.

"It requires a substantial showing of bias to disqualify a hearing officer in administrative proceedings or to justify a ruling that the hearing was unfair." United States v. O'Rourke, 213 F.2d 759, 763 (C.A. 8, 1954). Petitioner has failed to make any showing of bias, much less a substantial showing.

Moreover, even if petitioner's allegations of bias on the part of the hearing examiner were accepted, they could not affect the Board's order. In an appeal to the Board from the hearing examiner, the Board considers the entire case de novo. It examines the record and reaches its own findings and conclusions. Any prejudice resulting from prejudgment by the hearing examiner would thus be obviated. National Labor Relations Board v. Air Associates, Inc., 121 F.2d 586, 588-89 (C.A. 2, 1943).

---

23/ Indeed, the Administrator said that he felt the examiner had gone too far in his solicitude for the petitioner. (Tr. 125, 128).

24/ In this case, the Board agreed with the examiner's findings and conclusions, and, after discussing the case, adopted the examiner's initial decision.

25/ "Even assuming, however, that it were proved, either by the record or otherwise, that the examiner was biased against respondent, we would find no reason, merely because of that fact, for upsetting the Board's order, since respondent does not assert that the examiner committed any error in the admission or exclusion of evidence, nor is there any indication that he conducted himself in a manner which either was likely to intimidate any of the witnesses or to prevent any of them from giving any relevant testimony as to what they believed to be the facts. An examination of the record shows no such unfairness as to constitute a denial of due process." 121 F.2d at 589.



Petitioner's allegation of bias on the part of the Board (Pet. Br. 12-13) thus is apparently only another expression of his opinion that the Board decided the case wrong. Patently, there is no basis for a charge of bias, as such, and, indeed, petitioner offers none.

CONCLUSION

The Board's order should be affirmed.

Respectfully submitted,

DONALD F. TURNER,  
Assistant Attorney General,

O. D. OZMENT  
Deputy General Counsel,

HOWARD E. SHAPIRO,  
Attorney,  
Department of Justice,

WARREN L. SHARFMAN  
Associate General Counsel,  
Litigation and Legislation

JOSEPH B. GOLDMAN  
General Counsel,  
Civil Aeronautics Board.

FREDERIC D. HOUGHTLING,  
PAUL D. GERBER,  
Attorneys,  
Civil Aeronautics Board.

January 1967



CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

---

Warren L. Sharfman  
Associate General Counsel  
Litigation and Legislation



APPENDIX A - Statutes and Regulations Involved

Relevant excerpts from the Federal Aviation Act of 1958 (72 Stat. 731, 49 U.S.C. 1301, et seq.):

\* \* \* \* \*

TITLE III -- ORGANIZATION OF AGENCY AND POWERS  
AND DUTIES OF ADMINISTRATOR

\* \* \* \* \*

Other Powers and Duties of Administrator

General

Sec. 313. [72 Stat. 752, 49 U.S.C. 1354] (a) The Administrator is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedures, pursuant to and consistent with the provisions of this Act, as he shall deem necessary to carry out the provisions of, and to exercise and perform his powers and duties under, this Act.

\* \* \* \* \*

TITLE VI -- SAFETY REGULATION OF CIVIL  
AERONAUTICS

General Safety Powers and Duties

Minimum Standards; Rules and Regulations

Sec. 601. [72 Stat. 775, 49 U.S.C. 1421] (a) The Administrator is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time:

\* \* \* \* \*

(6) Such reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedure, as the Administrator may find necessary to provide adequately for national security and safety in air commerce.

\* \* \* \* \*

## Airman Certificates

### Power to Issue Certificate

Sec. 602. [72 Stat. 776, 49 U.S.C. 1422] (a) The Administrator is empowered to issue airman certificates specifying the capacity in which the holders thereof are authorized to serve as airmen in connection with aircraft.

### Issuance of Certificate

(b) Any person may file with the Administrator an application for an airman certificate. If the Administrator finds, after investigation, that such person possesses proper qualifications for, and is physically able to perform the duties pertaining to, the position for which the airman certificate is sought, he shall issue such certificate, containing such terms, conditions, and limitations as to duration thereof, periodic or special examinations, tests of physical fitness, and other matters as the Administrator may determine to be necessary to assure safety in air commerce. Except in the case of persons whose certificates are, at the time of denial, under order of suspension or whose certificates have been revoked within one year of the date of such denial, any person whose application for the issuance or renewal of an airman certificate is denied may file with the Board a petition for review of the Administrator's action. The Board shall thereupon assign such petition for hearing at a place convenient to the applicant's place of residence or employment. In the conduct of such hearing and in determining whether the airman meets the pertinent rules, regulations, or standards, the Board shall not be bound by findings of fact of the Administrator. At the conclusion of such hearing, the Board shall issue its decision as to whether the airman meets the pertinent rules, regulations, and standards and the Administrator shall be bound by such decision: Provided, That the Administrator may, in his discretion, prohibit or restrict the issuance of airman certificates to aliens, or may make such issuance dependent on the terms of reciprocal agreements entered into with foreign governments.

\* \* \* \* \*

### Amendment, Suspension, and Revocation of Certificates

Sec. 609. [72 Stat. 779, 49 U.S.C. 1429] The Administrator may, from time to time, reinspect any civil aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, or may reexamine any civil airman. If, as a result of any such reinspection or reexamination, or if, as a result of any other investigation made by the Administrator, he determines that safety in air commerce or air transportation and the public interest requires, the Administrator may issue an order amending, modifying, suspending, or revoking, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman



certificate, air carrier operating certificate, air navigation facility certificate, or air agency certificate. Prior to amending, modifying, suspending, or revoking any of the foregoing certificates, the Administrator shall advise the holder thereof as to any charges or other reasons relied upon by the Administrator for his proposed action and, except in cases of emergency, shall provide the holder of such a certificate an opportunity to answer any charges and be heard as to why such certificate should not be amended, modified, suspended, or revoked. Any person whose certificate is affected by such an order of the Administrator under this section may appeal the Administrator's order to the Board and the Board may, after notice and hearing, amend, modify, or reverse the Administrator's order if it finds that safety in air commerce or air transportation and the public interest do not require affirmation of the Administrator's order. In the conduct of its hearings the Board shall not be bound by findings of fact of the Administrator. The filing of an appeal with the Board shall stay the effectiveness of the Administrator's order unless the Administrator advises the Board that an emergency exists and safety in air commerce or air transportation requires the immediate effectiveness of his order, in which event the order shall remain effective and the Board shall finally dispose of the appeal within sixty days after being so advised by the Administrator. The person substantially affected by the Board's order may obtain judicial review of said order under the provisions of section 1006, and the Administrator shall be made a party to such proceedings.

\* \* \* \* \*

## TITLE X -- PROCEDURE

\* \* \* \* \*

### Orders, Notices, and Service

#### Effective Date of Orders; Emergency Orders

Sec. 1005. [72 Stat. 794, as amended by 73 Stat. 427, 49 U.S.C. 1485] (a) Except as otherwise provided in this Act, all orders, rules, and regulations of the Board or the Administrator shall take effect within such reasonable time as the Board or Administrator may prescribe, and shall continue in force until their further order, rule, or regulation, or for a specified period of time, as shall be prescribed in the order, rule, or regulation: Provided, That whenever the Administrator is of the opinion that an emergency requiring immediate action exists in respect of safety in air commerce, the Administrator is authorized, either upon complaint or his own initiative without complaint, at once, if he so orders, without answer or other form of pleading by the interested person or persons, and with or without notice, hearing, or the making or filing of a report, to make such just and reasonable orders, rules, or regulations, as may be essential in the interest of

safety in air commerce to meet such emergency: Provided further, That the Administrator shall immediately initiate proceedings relating to the matters embraced in any such order, rule, or regulation, and shall, insofar as practicable, give preference to such proceedings over all others under this Act.

\* \* \* \* \*

## Judicial Review of Orders

### Orders of Board and Administrator subject to Review

Sec. 1006 [72 Stat. 795, as amended by 74 Stat. 255, 75 Stat. 497, 49 U.S.C. 1486] (a) Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

\* \* \* \* \*

### Findings of Fact Conclusive

(e) The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so.

\* \* \* \* \*

Relevant provision of the Federal Aviation Regulations, 14 C.F.R. 1.0 et seq. :

CHAPTER 1, SUBCHAPTER D - AIRMEN

Part 67 -- Medical Standards and Certification

Subpart A -- General

\* \* \* \* \*

§ 67.15 Second-class medical certificate.

(a) To be eligible for a second-class medical certificate, an applicant must meet the requirements of paragraphs (b) through (f) of this section.

(b) Eye:

(1) Distant visual acuity of 20/20 or better in each eye separately, without correction; or of at least 20/100 in each eye separately corrected to 20/20 or better with corrective glasses, in which case the applicant may be qualified only on the condition that he wears those glasses while exercising the privileges of his airman certificate.

(2) Enough accommodation to pass a test prescribed by the Administrator based primarily on ability to read official aeronautical maps.

(3) Normal fields of vision.

(4) No pathology of the eye.

(5) Ability to distinguish aviation signal red, aviation signal green, and white.

(6) Bifoveal fixation and vergencephoria relationship sufficient to prevent a break in fusion under conditions that may reasonably occur in performing airman duties.

Tests for the factors named in subparagraph (6) of this paragraph are not required except for applicants found to have more than one prism diopter of hyperphoria, six prism diopters of esophoria, or six prism diopters of exophoria. If these values are exceeded, the Federal Air Surgeon may require the applicant to be examined by a qualified eye specialist to determine if there is bifoveal fixation and adequate vergencephoria relationship. However, if the applicant is otherwise qualified, he is entitled to a medical certificate pending the results of the examination.



(c) Ear, nose, throat and equilibrium:

(1) Ability to hear the whispered voice at 8 feet with each ear separately.

(2) No acute or chronic disease of the middle or internal ear.

(3) No disease of the mastoid.

(4) No unhealed (unclosed) perforation of the eardrum.

(5) No disease or malfunction of the nose or throat that might interfere with or be aggravated by, flying.

(6) No disturbance in equilibrium.

(d) Nervous system:

(1) No established medical history or clinical diagnosis of any of the following:

(i) A character behavior disorder that is severe enough to have repeatedly manifested itself by overt acts.

(ii) A psychotic disorder.

(iii) Chronic alcoholism.

(iv) Drug addiction.

(v) Epilepsy.

(vi) A disturbance of consciousness without satisfactory medical explanation of the cause.

(2) No other disease of the nervous system, mental abnormality, or psychoneurotic disorder that the Civil Air Surgeon finds --

(i) Makes the applicant unable to safely perform the duties or exercise the privileges of the airman certificate that he holds or for which he is applying; or

(ii) May reasonably be expected within 2 years after the finding, to make him unable to perform those duties or exercise those privileges;

and the findings are based on the case history and appropriate, qualified, medical judgment relating to the condition involved.

(e) Cardiovascular:

(1) No established medical history or clinical diagnosis of--

(i) Myocardial infarction; or

(ii) Angina pectoris or other evidence of coronary heart disease that the Federal Air Surgeon finds may reasonably be expected to lead to myocardial infarction.

(f) General medical condition:

(1) No established medical history or clinical diagnosis of diabetes mellitus that requires insulin or any other hypoglycemic drug for control.

(2) No other organic, functional, or structural disease, defect, or limitation that the Federal Air Surgeon finds --

(i) Makes the applicant unable to safely perform the duties or exercise the privileges of the airman certificate that he holds or for which he is applying; or

(ii) May reasonably be expected, within two years after the finding to make him unable to perform those duties or exercise those privileges;

and the findings are based on the case history and appropriate, qualified, medical judgment relating to the condition involved.

\* \* \* \* \*

[Section f is identical in terms with the comparable sections governing first and second class medical certificates, section 67.13 (f) and 67.17 (f), respectively.]

Relevant provision of the Civil Aeronautics Board Procedural Regulations, 14 C.F.R. 301.1, et seq.

CIVIL AERONAUTICS BOARD PROCEDURAL REGULATIONS

Part 301 -- RULES OF PRACTICE IN AIR SAFETY PROCEEDINGS

\* \* \* \* \*

§ 301.22 Burden of proof

In proceeding under section 609 of the Act the burden of proof shall be on the Administrator.

\* \* \* \* \*

Procedure on Emergency Orders

§ 301.50 Proceedings where the Administrator has made an emergency order.

\* \* \* \* \*

(c) The examiner shall, immediately upon the filing of the answer, set the date and place for hearing upon not to exceed 8 days' notice to the parties. The initial decision (not made under authority delegated by § 301.29(b)) shall be made orally on the record at the termination of the hearing and after opportunity for oral argument.

\* \* \* \* \*



APPENDIX B

Excerpt from the Board brief in John Doe v. Civil Aeronautics Board, 356 F.2d 699 (C.A. 10, 1966), relating to the jurisdiction of the court to consider the validity of the Administrator's regulation in a statutory appeal from an order of the Board:

B. Jurisdiction of the Court to consider the validity of the Administrator's regulation

1. The proper role of the Board in reviewing the Administrator's application of his regulations, and the manner in which judicial review is to be obtained of such regulations, are matters of major importance in the congressional scheme for enforcement of air safety under the Federal Aviation Act. In these circumstances, we are constrained to show that the Board may not provide review of the validity of the Administrator's regulations, but only of the propriety of the application of the regulations to the specific case. As a consequence, there is serious doubt whether the Administrator's regulations may be reviewed by the courts as an incident to their review of a Board order applying those regulations.

One of the principal purposes of the Federal Aviation Act of 1958 was to centralize authority over air safety in the Administrator of the new Federal Aviation Agency. He was to be responsible for both the promulgation and the administration of safety standards and regulations. As the Senate Report emphasized (S. Rep. No. 1811, 85th Cong., 2d Sess., p. 10):

"The proposed legislation abolishes the present unnatural division of responsibility between the Civil Aeronautics Administration and the Civil Aeronautics Board for the promotion of civil aeronautics generally, and gives full

authority in this field to a new Federal Aviation Agency. The Agency, headed by a civilian administrator, would replace the present Civil Aeronautics Administration, assuming all of its existing functions as well as all safety regulatory functions of the Civil Aeronautics Board. It would be independent of any other Government agency and responsible only to the Congress, the President and the public."

The congressional intent that the Board was not to have supervisory or reviewing authority over the Administrator's safety regulations was made clear in the course of legislative consideration of the 1958 Act. As originally drafted, the bill would have empowered the Board, either upon its own initiative or upon request of persons affected, to suspend for review of any of the Administrator's rules, regulations, and standards when it finds reasonable grounds to believe that they will "impose substantial economic hardship on persons affected thereby without sufficient cause"; and if the Board finds such effect, it would have authority "to order such modification as it may deem necessary to eliminate such substantial economic hardship."<sup>26/</sup> As a result of emphatic opposition by both the industry and the Executive Branch of the Government, this provision was eliminated. The Senate Report stated (S. Rep. No. 1811, supra, at p. 11):

"As originally proposed, S. 3880 would have permitted the appeal of safety-rule-making action by the Administrator

---

<sup>26/</sup> Sec. 18(3), S. 3880, 85th Cong., 2d Sess., pp. 26, 27, May 21, 1958, which would have amended Section 601(c) of the Civil Aeronautics Act of 1938. An identical provision was contained in the House version. Sec. 18(3), H.R. 12616, 85th Cong., 2d Sess., pp. 26, 27, May 21, 1958.

to the Board whenever economic hardship might be involved. Your committee has deleted this provision, however, since in practical effect it would have allowed virtually all such rules to be appealed, thus frustrating and inhibiting the efficient discharge of this vital function by the Administrator, and continuing the present dichotomy in rulemaking."

2. The significant fact is that the successful opponents of this provision urged that the Administrator's rules should be reviewed only by the courts, and stressed that this was the objective of deleting the above draft section. General Quesada, then Special Advisor to the President and later the first Administrator under the 1958 Act, appearing in behalf of the Administration, stated:<sup>27/</sup>

"S. 3880 provides for appeal of the regulations to the Civil Aeronautics Board. This appears to be an unnecessary appellate step and threatens to continue the present confusion of responsibility between the two agencies. \* \* \* The regulations should be issued in the name of the head of the Agency and appeals therefrom should be directly to the courts as is prevalent practice in other similar Agencies."

James T. Pyle, the then Administrator of Civil Aeronautics, pointed out that "the present difficulty in the administration of the rules and regulations relating to aviation that must be cured is the diffusion of authority in several agencies," and argued that the appeal provision "defeats the basic objective of this legislation which is to establish a single Agency with adequate authority to assure the safe and efficient operation of air traffic"(Senate Hearings, p. 233). He agreed that there should be protection against

---

<sup>27/</sup> Hearings before a Subcommittee on Aviation of the Senate Committee on Interstate Commerce, 85th Cong., 2d Sess., on S. 3880 (hereinafter referred to as "Senate Hearings"), pp. 153-154.



arbitrary action but emphasized that an appeal to the Board was unnecessary in this regard in view of the availability of court review (Id. pp. 233-234). And the industry position was presented by Stuart G. Tipton, the president of the Air Transport Association, who urged that the bill be amended to vest the safety rule-making power "in a new Agency without appeal", and added, "[l]et the new Agency, after following the usual legal procedures for issuing regulations, adopt them, take the responsibility for them, and provide those interested, the ones affected, with their legal remedies in the courts rather than to have an additional administrative step to the Civil Aeronautics Board."<sup>28/</sup>

Further, the President's Message to the Congress requesting new legislation recommended that the function of issuing air safety regulations then vested in the Board "be lodged in" the FAA, and specified that "[d]ecisions of the Administrator with respect to such regulations should be final, subject, of course, to such appeals

---

<sup>28/</sup> Senate Hearings, p. 33. In the course of Mr. Tipton's testimony, Senator Monroney, the author of the bill, and Senator Smathers both pointed out that review of the merits of a regulation or standard would be unavailable if the only recourse were to the courts which must confine themselves to such narrow questions as arbitrariness and lack of power. The provision permitting an appeal to the Board, they said, would make possible review on the merits (Senate Hearings, pp. 33, 35-36). Mr. Tipton answered that the right to appeal would "delay decision, and \* \* \* divide responsibility, and the conclusion we reached was that our tremendous need at this time for decision and for consolidated responsibility \* \* \* for these regulations, outweighed the benefits that we might get from appeals." He therefore opposed appeals "other than to the courts" (Id., p. 34).

to the courts as may be appropriate."<sup>29/</sup> That this approach prevailed is demonstrated by the Senate Committee Report, which, in stating that it had deleted the provision for appeal of regulations to the Board, quoted from the testimony of Louis S. Rothschild, the then Undersecretary of Commerce for Transportation: "Our courts are our constant safeguard against the exercise of power arbitrarily--Congress is our safeguard against the exercise of authority unwisely."<sup>30/</sup>

The question of review also was adverted to in the congressional debates. Thus, the following colloquy between Senator Monroney (the Senate sponsor of the bill) and Senator Thye confirms the congressional understanding and intent (104 Cong. Rec. 13646 (1958)):

"Mr. Thye. Will the Board have an opportunity to review a rule which is being contemplated by the Administrator before it is put into effect?"

"Mr. Monroney. The Board will not have such an opportunity. The review, as such, will be in the courts."

In the same vein, Congressman Harris (the House sponsor) stated that safety rulemaking had been transferred to the Administrator "without any review by the Civil Aeronautics Board but subject to the Administrative Procedures [sic] Act" (104 Cong. Rec. 16080 (1958)).

In sum, the Administrator's issuance of regulations cannot be directly challenged by appeal to the Board, only by a proceeding in the federal district courts. An example of such a proceeding was the

---

<sup>29/</sup> Message of President Eisenhower to the Congress, June 13, 1958, set forth in S. Rep. No. 1811, 85th Cong., 2d Sess., p. 27.

<sup>30/</sup> Id., p. 12. See also H. Rep. No. 2360, 85th Cong., 2d Sess., pp. 11, 16.

case challenging the Administrator's establishment of an age limitation for airline pilots, Air Line Pilots Ass'n v. Quesada, 276 F.2d 892 (C.A. 2, 1960), cert. denied, 366 U.S. 962 (1961).<sup>31/</sup>

3. While the 1958 Act precludes Board review of the Administrator's regulations, it provides that the Board would continue to exercise "quasi-judicial powers" over specific agency orders, i.e., "with respect to Agency action involving individual airman, aircraft, and related safety certificates" (S. Rep. 1811, 85th Cong., 2d Sess., pp. 10-11; H. Rep. 2360, 85th Cong., 2d Sess., p. 16). Orders of the Administrator denying applications for airman certificates may be appealed to the Board under Section 602 of the Act, as occurred in this case; and disciplinary orders--modifying, suspending or revoking all types of certificates (airman, air worthiness, air carriers operating, etc.)--may be appealed to the Board under Section 609.

Even in these proceedings, it appears to be clear that the Board reviews only the application of the Administrator's rules, and has no authority to pass upon their propriety. This is explicitly provided by statute in the situation here involved; review of orders denying application for airman certificates. For Section 602 states that the Board decision shall be "whether the

---

<sup>31/</sup> In advance of the issuance of an order, the Administrator's regulation cannot be reviewed in this Court under Section 1006, 49 U.S.C. 1486, but is challenged in a district court proceeding. Division of Production v. Halaby, 307 F.2d 363 (C.A. 5, 1962); Arrow Airways, Inc. v. Civil Aeronautics Board, 182 F.2d 705 (C.A.D.C. 1950), cert. denied, 340 U.S. 828 (1950).



airman meets the pertinent rules, regulations and standards" of the Administrator, and the Board has properly construed the Act as denying it authority to provide review of the validity of the Administrator's regulations. Docket SM-4-4, William B. Coberly, Jr., 31 C.A.B. 1089 (1960); Docket SM-4-18, Robert N. Gosch, 31 C.A.B. 1098 (1960). While there is no such explicit limitation in Section 609, dealing with disciplinary actions, the legislative history and other considerations which militate against Board review of the Administrator's rules in Section 602 proceedings are equally applicable to ones arising under Section 609.<sup>32/</sup>

4. The limited scope of the Board's review of an Administrator's order presents a problem when the airman (or other party) subject to such order seeks to challenge both (a) the validity of the underlying rule of the Administrator and (b) the factual basis for the order that he did not satisfy the requirements of the rule. Under Section 602,

---

<sup>32/</sup> An additional indication that the Board was not intended to provide review of the Administrator's regulations is found in Section 1001 of the Act (49 U.S.C. 1481), which provides that:

"The Board, in its discretion, may enter its appearance and participate as an interested party in any proceeding conducted by the Administrator under title III of this Act, and in any proceeding conducted by the Administrator under title VI of this Act from which no appeal is provided to the Board."

It would be incongruous indeed if the Congress had conferred the right upon the Board to participate in rule-making proceedings before the Administrator (which it has), and at the same time intended it to have the authority to set aside those regulations which it could not persuade the Administrator to alter.

resort by administrative appeal to the Board is appropriate only when the airman controverts the factual determination that he does not satisfy the applicable rules; exhaustion of this administrative appeal would, indeed, be a necessary prelude to judicial review on this point. Conversely, if the airman desires to challenge only the validity of the Administrator's rule, it seems clear that he could seek judicial review of the Administrator's denial directly in the courts. Congress evidently did not consider the present situation, in which petitioner raises both issues.

As a general rule, cases dealing with regulatory acts establish that a party attacking administrative orders can, in the same proceeding, challenge the validity of an underlying rule. E.g., Functional Music, Inc. v. Federal Communications Commission, 274 F.2d 543 (C.A.D.C. 1958), cert. denied, 361 U.S. 813 (1959); Dyer v. Securities and Exchange Commission, 266 F.2d 33 (C.A. 8, 1959), cert. denied, 361 U.S. 835 (1959). An example on review of an order of the Civil Aeronautics Board applying its own regulation, is Great Lakes Airlines, Inc. v. Civil Aeronautics Board, 291 F.2d 354, 367 (C.A. 9, 1961), cert. denied, 368 U.S. 890 (1961). These cases, however, involve the ordinary situation in which the regulations were those of the agency applying them, and in which the agency had authority both to re-examine them and, in the course thereof, to receive any evidence which might be pertinent to the claim of invalidity advanced.

The difficulty in applying this doctrine here arises, as indicated, from the limited scope of the Board's authority. This is a

proceeding against the Board as respondent under Section 1006 and it is, of course, prepared to defend its decision that the petitioner had not qualified under the regulations. However, the Board is hardly an appropriate party to defend the validity of a regulation of the Administrator, an issue which it has not considered and which was not open before it. Review of the Board's order is limited in the normal course to matters which are or may be determined by it. Section 1006 itself appears to contemplate judicial review only of the determination which the lower tribunal was empowered to make (in this case the Board's determination of whether the airman meets the Administrator's standards), as witnessed by the provisions of Section 1006(e) which embody the substantial evidence rule, and preclude consideration by the reviewing court of matters not urged to the agency unless there were reasonable grounds for such failure. And the provision authorizing intervention of the Administrator (Section 1008) does not appear to expand these jurisdictional limits. Moreover, to the extent that the party challenging the validity of a rule desires to make an evidentiary case, the Board does not appear to be a proper forum to take the evidence, since it cannot rule upon the issue.

On the other hand, the conclusion which would appear to follow, that the issue of validity of the Administrator's rule may not be raised in a proceeding for review of a Board order applying it, would result in a situation in which the airman would be required to resort to separate proceedings to obtain full review. One would be the administrative appeal to the Board followed by judicial review, as here, to determine



whether the petitioner satisfied the Administrator's regulations. The other would be a direct challenge to the Administrator's regulation in a separate judicial proceeding. This alternative doubtless would be unsatisfactory from the point of view of the airman and also would result in court litigation beyond that which would eventuate if the issue of validity of the rule were open in proceedings for review of the Board orders applying it. However, there is serious doubt that the statutory scheme adopted by Congress permits both issues to be raised in a proceeding for review of the Board's order under Section 1006.

If the Court should reach the question as to its jurisdiction to consider the validity of the Administrator's rule in this proceeding, it is the position of the Board and the Administrator that the Court lacks jurisdiction. They believe that requiring a separate proceeding to challenge the validity of the Administrator's underlying regulation represents the most practical solution consonant with the legislative history and the over-all statutory pattern. The Department of Justice takes no position on the merits of the jurisdictional issue at this time. As already indicated, however, the issue posed by the petition is believed to so obviously lack substance that the Court may dispose of it summarily without deciding the jurisdictional point, as did the Court of Appeals for the Fourth Circuit in the Carrington case.

NO. 20725

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FRANCES HAYNES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
NORTHERN DIVISION

---

WM. MATTHEW BYRNE, JR.  
United States Attorney

ROBERT L. BROSIO  
Assistant U. S. Attorney  
Chief, Criminal Division

ERIC A. NOBLES  
Assistant U. S. Attorney

600 U. S. Court House  
312 North Spring Street  
Los Angeles, Calif. 90012

Attorneys for Appellee  
United States of America

FILED

JUL 3 1967





NO. 20725

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FRANCES HAYNES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
NORTHERN DIVISION

---

WM. MATTHEW BYRNE, JR.  
United States Attorney

ROBERT L. BROSIO  
Assistant U. S. Attorney  
Chief, Criminal Division

ERIC A. NOBLES  
Assistant U. S. Attorney

600 U. S. Court House  
312 North Spring Street  
Los Angeles, Calif. 90012

Attorneys for Appellee  
United States of America



## TOPICAL INDEX

	<u>Page</u>
I JURISDICTIONAL STATEMENT	1
II PERTINENT STATUTE	3
III STATEMENT OF FACTS	4
IV ARGUMENT	7
A. APPELLANT HAD CONSTRUCTIVE POSSESSION OF THE HEROIN AS CHARGED IN COUNTS FIVE AND SIX	7
B. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN A FINDING OF GUILTY AS TO COUNT VII	10
V CONCLUSION	12
CERTIFICATE	13



## TABLE OF AUTHORITIES CITED

<u>Cases</u>	<u>Page</u>
Anthony v. United States 331 F.2d 687 (9th Cir. 1964)	12
Bruno v. United States 259 F.2d 8 (9th Cir. 1958) cert. denied 333 U.S. 832	11
Hernandez v. United States 300 F.2d 114 (9th Cir. 1962)	8
McClure v. United States 332 F.2d 19 (9th Cir. 1964)	8, 10
Pon Wing Quong v. United States 111 F.2d 751 (9th Cir. 1940)	11
Rodella v. United States 286 F.2d 306 (9th Cir. 1960)	8
Williams v. United States 290 F.2d 451 (9th Cir. 1961)	12

<u>Codes</u>	
Title 21, United States Code §174	1, 3, 10
Title 28, United States Code §1291	2
Title 28, United States Code §1294	2





IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FRANCES HAYNES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

I

JURISDICTIONAL STATEMENT

---

Appellant, Frances Haynes, and James Walter Nelson were indicted by the Federal Grand Jury for the Northern Division of the Southern District of California, on June 10, 1964, under No. 4101-ND [C. T. 2].<sup>1/</sup> The indictment was in seven counts. Counts One, Two, Three and Four were charged against co-defendant Nelson alone. Counts Five, Six and Seven were charged against both appellant and her co-defendant. Count Five of the indictment charged violations of Title 21, United States Code,

---

<sup>1/</sup> C. T. refers to the Clerk's Transcript of Record on Appeal.



Section 174, knowingly and unlawfully receiving, concealing and facilitating the concealment and transportation of heroin, a narcotic drug, on or about May 3, 1964. Count Six charged the unlawful and knowing selling and facilitation of sale on the same occasion. Count Seven charged a violation of Title 21, U. S. C. 174, unlawful receiving, concealing and facilitating the concealment and transportation of heroin, on or about May 20, 1964.

On July 13, 1964, appellant was arraigned and entered a plea of not guilty. Appellant was represented at trial by court appointed counsel [C. T. 9].

On April 7, 1965, the appellant was convicted on all three counts after a court trial before the Honorable Myron D. Crocker, United States District Judge [C. T. 11]. On June 7, 1965, the appellant was committed to the custody of the Attorney General for a period of six years on Count Five; six years on Count Six, and six years on Count Seven. The sentences on Counts Six and Seven were to run concurrently with sentence on Count Five. The appellant was permitted to remain on bond pending the filing of an appeal [C. T. 13].

On June 10, 1965, a timely appeal was filed by appellant in this court under the provisions of Title 28, United States Code, Sections 1291 and 1294 [C. T. 14].



## II

### PERTINENT STATUTE

---

Title 21, United States Code, Section 174, provides as follows:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than \$20,000.

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize





conviction unless the defendant explains the possession to the satisfaction of the jury."

### III

#### STATEMENT OF FACTS

---

On April 29, 1964, two sales of heroin took place in Fresno, California. The buyer in both instances was John Lee, who was working as an undercover United States Treasury Agent assigned to the Bureau of Narcotics [R. T. 55]. <sup>2/</sup> The location for both sales was the same, Room 4, City Motel, Fresno [R. T. 57, 63].

The first sale occurred shortly after John Lee arrived at the room. He was admitted by Frank Barnes, and when inside, he was introduced to three persons including James Nelson and the appellant, Frances Haynes [R. T. 57]. The transfer took place in the bathroom with Nelson handing Lee three "spoons" of heroin and receiving the sum of \$350.00 in return [R. T. 58-59]. At the time of this transfer of heroin, the appellant remained in the living room [R. T. 58].

John Lee then left the motel and returned later in the evening when the second sale of heroin took place. The transfer again occurred in the bathroom between Nelson and Lee. On this occasion, Nelson gave Lee two "spoons" of heroin and received the sum of \$200 [R. T. 63]. As before, the appellant stayed in the

---

/ R. T. refers to Reporter's Transcript.



living room during the transaction [R. T. 63].

A day later, on April 30, 1964, appellant personally made arrangements for an additional sale of heroin to John Lee. The amount was to be a "piece" (an ounce of heroin), the price, \$600, and it was to be good quality heroin [R. T. 68]. The transaction would take place the following weekend in Fresno [R. T. 67-68]. Appellant further indicated that she would be able to take care of any further purchases of heroin that John Lee might want to make [R. T. 68].

Pursuant to the agreement for the sale, John Lee went at 1:00 A.M., on May 3, 1964, to Room 4, City Motel, Fresno. At this time, the terms of the previous arrangement were carried out. Lee met with Nelson in the bathroom of the motel room, Nelson handed Lee one ounce of heroin and received in return the agreed upon sum of \$600 [R. T. 70-71].

Afterwards on May 13, 1964, John Lee spoke with the appellant and complained about the quantity of the heroin he had received in the sale on May 3rd [R. T. 75]. He told appellant that it was less than the ounce they had agreed upon. She replied that she could not understand how that could be since the particular heroin sold to him had been measured with a spoon [R. T. 75].

During this same conversation, appellant made arrangements for another sale of heroin to John Lee. Appellant agreed to sell a larger amount in the next transaction, namely twelve ounces of heroin for the sum of \$6,000. [R. T. 75]. The exact date for the sale would be determined within a few days [R. T. 76].



On May 18, 1964, Lee received a telephone call from Nelson who stated that they did not have 12 ounces to sell just at that time, but that they did have 2-1/2 ounces [R. T. 78]. Nelson further informed Lee that, after considering the matter, he should phone the appellant and let her know if he wanted to buy the smaller amount [R. T. 78].

Later that date, Lee contacted appellant at a location in Los Angeles [R. T. 79]. At this time she agreed to sell Lee 2-1/2 ounces of heroin for the sum of \$1200. [R. T. 79]. The transaction was planned to take place at a motel in Fresno where Lee would obtain a room, and at a time after 7:00 P. M., on May 19, 1964 [R. T. 80].

Because of John Lee's subsequent illness, he was unable to be present at the planned culmination of this transaction. Another U.S. Treasury Agent, Steven S. Chesley, substituted for him, and checked in to Room 118, Carousel Motel, Fresno, on the evening of May 19th [R. T. 84-85].

At 5:45 A. M., May 20, 1964, Chesley received a telephone call from Nelson regarding the sale previously agreed upon [R. T. 85-86]. Chesley, imitating Lee's voice, gave Nelson the directions to the motel [R. T. 86].

At 6:00 A. M., Nelson and the appellant arrived at the motel in a taxi [R. T. 87, 96]. While appellant remained in the car with the heroin, Nelson went to Room 118 and was placed under arrest as he entered. As a narcotic officer then approached the taxi that was parked outside the motel, the appellant attempted





to conceal a cigarette package containing the heroin [R. T. 97-98].

At this time, the appellant was placed under arrest [R. T. 97].

#### IV

#### ARGUMENT

A. APPELLANT HAD CONSTRUCTIVE  
POSSESSION OF THE HEROIN AS  
CHARGED IN COUNTS FIVE AND  
SIX.

---

Appellant maintains that the sole evidence relating to Counts Five and Six consists of Agent Lee's testimony concerning two sales of heroin that took place in a motel room in Fresno, allegedly on May 3, 1964 [Appellant's Brief, p. 3]. Appellant argues that these transactions occurred between John Lee and James L. Nelson, and that at no time did she actively participate in the sale [Appellant's Brief, pp. 3-4]. Lee's testimony, according to appellant, "... was essentially the evidence used by the court in finding the appellant guilty of Counts Five and Six of the indictment." [Appellant's Brief, p. 4].

An examination, however, of the record of trial will reflect the inaccuracy of this contention. The two sales of heroin referred to took place, not on May 3rd, but on April 29, 1964 [R. T. pp. 56-64]. The appellant is not charged with any offense taking place on April 29, 1964 [C. T. 2-8].

A single sale of heroin did, nevertheless, take place on May 3, 1964 for which the appellant was charged [R. T. 70-71].



That transaction forms the basis of Counts Five and Six of the indictment [C. T. 6-7].

The prime issue is the existence of sufficient evidence of possession of heroin on the part of the appellant. Although she did not physically engage in the actual transfer on May 3rd, the record is clear that she exercised dominion and control of the heroin involved. The evidence is uncontroverted of appellant's deep and direct involvement and participation in the actual sale.

The courts have consistently held that evidence of dominion and control of a narcotic is sufficient to warrant a finding of constructive possession.

As the Court has held in Hernandez v. United States, 300 F.2d 114, 117 (9th Cir. 1962):

"So long as the evidence establishes the requisite power in the defendant to control the narcotic drugs, it is immaterial that they may not be within the defendant's immediate physical custody, or, indeed, that they may be physically in the hands of the third persons -- 'possession' as used in this statute included both actual and constructive possession. The power to control an object may be shared with others, and hence, 'possession' ... need not be exclusive, but may be joint."

See also Rodella v. United States, 286 F.2d 306 (9th Cir. 1960), and McClure v. United States, 332 F.2d 19 (9th Cir. 1964).



In the instant case, the sale of heroin on May 3rd can be traced directly to the events of April 29th. Agent Lee had gone to the City Motel in Fresno to make a narcotic purchase. Two sales took place in the bathroom of the motel unit between the agent and James Nelson. It was at this time, just prior to the first actual sale, that Agent Lee was introduced to the appellant.

It was only one day later, on April 30th, that appellant personally set up a specific sale of heroin to Lee that took place on May 3rd [R. T. 67-68]. It was the appellant who set up all the details: She established the price of \$600.00 for the ounce, she guaranteed it would be good quality heroin, and set the location of the sale as the following weekend in Fresno [R. T. 68].

Pursuant to this agreement, Lee in fact made the purchase. It took place in Room 4, City Motel, Fresno, this being the exact location of the two sales on April 29th. The mode of transfer was precisely the same, with the exchange taking place in the bathroom between Lee and James Nelson.

It is revealing to examine the statements of appellant after the transaction of May 3rd. It was on May 13th, that Agent Lee spoke with appellant and complained he had not received the full ounce of heroin they had agreed upon. Appellant at this time indicated she could not understand how that could have happened, since the heroin had been measured with a spoon [R. T. 79].

In light of these uncontradicted facts, the relevant statute is controlling to the extent that "... possession shall be deemed sufficient evidence to authorize conviction unless the defendant





explains the possession to the satisfaction of the jury." Title 21,  
United States Code, Section 174.

In 1964 this Court ruled that:

"Possession sufficient to raise the  
presumption can be either actual or 'constructive'.  
Actual physical contact with the drugs is not  
required; rather, possession consists of 'having  
[the drugs] in one's control or under one's  
dominion.' (Citation omitted) The power to  
control can be shared by others, and it can be  
shown by direct or circumstantial evidence."

McClure v. United States, 332 F.2d 19, 23

(9th Cir. 1964).

B. THE EVIDENCE WAS SUFFICIENT  
TO SUSTAIN A FINDING OF GUILTY  
AS TO COUNT VII.

---

Appellant argues that "... Count 7 of the Indictment ...  
refers to a sale allegedly made by appellant which occurred on  
May 20, 1964." [Appellant's Brief, p. 5]. It is then suggested  
that the evidence was insufficient since in fact no sale ever  
occurred. [Appellant's Brief, p. 5].

Count Seven of the Indictment, however, refers not to a  
sale of heroin, but rather to a knowing receiving, concealment and  
facilitating the concealment of heroin, in violation of Title 21,  
United States Code, Section 174 [C. T. 8].



This Court in Pon Wing Quong v. United States, 111 F.2d 751, 756 (9th Cir. 1940), has discussed the meaning of the word 'facilitate' as used in the above statute:

"... the common and ordinary definition as expressed by a standard dictionary. Quoting from Webster's Unabridged Dictionary, 'facilitate' is defined as follows: 'To make easy or less difficult; to free from difficulty or impediment; as to facilitate the execution of a task.' "

See also Bruno v. United States, 259 F.2d 8 (9th Cir. 1958), cert. denied 333 U.S. 832.

The record of trial contains abundant evidence of appellant's constructive and physical possession of the heroin and of her knowing facilitation of its concealment. It was appellant who made personal arrangements with John Lee on May 13th for the sale of heroin to take place in a few days. It was appellant who set a price of \$500 an ounce for the 12 ounces [R. T. 75]. When she spoke to Lee again on May 18th, she modified the sale to involve only 2-1/2 ounces of heroin for \$1200 [R. T. 79]. The sale was to take place sometime after 7:00 P.M., on May 19th [R. T. 80]

Agent Chesley, substituting for Lee because of illness, received a phone call from Nelson at 6:00 P.M., on May 20th, he gave Nelson directions to the motel. Nelson and appellant arrived by taxi and appellant was arrested with the heroin in her physical possession [R. T. 97].

The evidence is clearly substantial in demonstrating



appellant's active facilitation of the attempted sale and the concealment and actual possession of the heroin.

Even if the evidence showed only a possible inference of possession (which certainly is not the case here) " . . . the possible inference becomes a proper inference of the fact of possession . . . and once made by the trier of fact, and determined by him to be substantial, clear and convincing proof, such a determination of fact is binding on (this court). Williams v. United States, 290 F.2d 451 (9th Cir. 1961). " Anthony v. United States, 331 F.2d 87, 691 (9th Cir. 1964).

## V

### CONCLUSION

There appearing from the foregoing ample evidence to support the conviction, the appellee respectfully prays that the judgment of conviction be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, Jr.  
United States Attorney

ROBERT L. BROSIO,  
Assistant U. S. Attorney  
Chief, Criminal Division

ERIC A. NOBLES,  
Assistant U. S. Attorney

Attorneys for Appellee  
United States of America





## CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Eric A. Nobles

ERIC A. NOBLES



NO. 20728 ✓

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

BERNARD KAPLAN; ALBERTO  
BERUMEN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

PETITION FOR REHEARING  
OF APPELLANTS BERNARD KAPLAN  
AND ALBERTO BERUMEN

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
CENTRAL DIVISION

---

ALEXANDER, INMAN & FINE  
8671 Wilshire Boulevard  
Beverly Hills, California 90211

Attorneys for Appellants

APR 10 1967

FILED  
APR 10 1967



NO. 20728

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

BERNARD KAPLAN; ALBERTO  
BERUMEN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

PETITION FOR REHEARING  
OF APPELLANTS BERNARD KAPLAN  
AND ALBERTO BERUMEN

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
CENTRAL DIVISION

---

ALEXANDER, INMAN & FINE  
8671 Wilshire Boulevard  
Beverly Hills, California 90211

Attorneys for Appellants





NO. 20728

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

BERNARD KAPLAN; ALBERTO  
BERUMEN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

PETITION FOR REHEARING  
OF APPELLANTS BERNARD KAPLAN  
AND ALBERTO BERUMEN

---

Pursuant to Rule Twenty-Three of the Rules of Court, United States Court of Appeals for the Ninth Circuit, Appellants Bernard Kaplan and Alberto Berumen submit this Petition for Rehearing predicated upon the following grounds:

1. In the opinion heretofore rendered by this Honorable Court with respect to the instant case, it was concluded that appellants were not denied effective assistance of counsel due to an inherent conflict of interest, or otherwise. Such conclusion was predicated primarily upon the fact that such a possible conflict of interest was not "factually disclosed, nor even suggested, by a careful reading of the record". Appellants submit that the following excerpts of record in this case clearly disclose both the fact of the



possible conflict of interest and the nature thereof. Mr. Beckler, appellants' attorney at trial, after advising the Court that "there is a definite conflict of interest between the two defendants Berumen and Kaplan" (Supp. Tr., p. IX, lines 1-2), and that he could not "honestly and in good conscience represent both defendants" (Supp. Tr., p. IX, lines 16-17), briefly explained the nature of the conflict to the Court. Mr. Beckler informed the Court as to the nature of the conflict in the following manner:

"MR. BECKLER: Without getting involved in substance, your Honor, I might say that I was notified -- or, I made a call and found out that Mr. Kaplan was wanted by the authorities and brought him down to the Commissioner's office for a proper arraignment and receiving the complaint. I was with him at all times. Therefore, I was under the impression -- no statements in fact were made. I found out now that previous to this, quite some time ago, there were certain statements made. These statements, without going into the substance of them -- that I didn't learn about in interviewing and counseling the defendant or in preparation for trial. I was convinced that none were made.

"I learned Saturday that certain ones were made that are extremely essential to the defense of Mr. Berumen."  
(Supp. Tr., p. XII, lines 1-14).

Such a conflict would necessarily continue to exist regardless as to whether the Court or a jury sat as the trier of fact. Accordingly, appellants request a reconsideration by this Court of said ground of



its opinion.

2. Appellants further submit that this Honorable Court, in rendering its decision herein, failed to give full consideration to the conduct of Mr. Beckler, appellants' trial attorney, following his disclosure to the District Court of the existence of a conflict in interest between Appellants. In this connection the records show that when the District Court would not grant a continuance in Appellants' trial until some time after April 19, 1965, Mr. Beckler, for his own convenience in the representation of another client, agreed to attempt to have new counsel for Appellant Kaplan ready and prepared for trial the afternoon of the day the case was originally scheduled for trial (Supp. Tr., p. XIV, line 16 - p. XV, line 10). It will be recalled that Mr. Beckler was at all times prepared to answer ready for Defendant Berumen (See Supp. Tr., p. VIII, lines 15-18). It will further be recalled that on the date set for trial, no other counsel was present to represent Defendant Kaplan, even though there had been no consent to a waiver of jury trial by the Court up to that time. Despite such conduct by Mr. Beckler, no inquiry was made by the Trial Court as to the nature of the existing conflict and the manner of its possible resolution due to a waiver of jury. Appellants request a Rehearing by this Honorable Court so that the Court may reconsider the duty of the Trial Judge in light of Mr. Beckler's conduct.

3. Appellants further submit that this Honorable Court's conclusion that the Trial Judge acted properly in reviewing certain "Jencks Act" statements of government agents was predicated upon





a misinterpretation of the facts as disclosed by the trial record. In this connection the record clearly discloses that the statements in question were presented by the U. S. Attorney to counsel for Appellants and their co-defendant at trial at the time Agent Tomsic was called to the stand (See R. T. , p. 154, line 17 to p. 155, line 2).

According to Mr. Balaban, the statements presented to counsel for the co-defendant at his request in advance of trial, were not "Jencks Act" statements of the government agent who was called to the stand, but rather were statements of "witnesses who had previously testified" (R. T. p. 154, lines 17-20). When after a recess of Court, counsel for the co-defendant first ascertained that the Trial Judge had a copy of the statements of government agents (See R. T. p. 159, line 17 to p. 160, line 4), said counsel questioned the right of the Court to examine such statements and stated, "I do not know whether under Jencks it was proper to give such reports to the trier of fact, your Honor" (R. T. p. 160, lines 21-25). Counsel for Appellants further inquired from the Court whether the Court had the right to read such statements (See R. T. p. 161, lines 11-16). The only thing which counsel for the co-defendant conceded as being "proper" was the delivery of the statements by the U. S. Attorney to him, not to the trier of fact.

The statements of Agent Tomsic were never offered into evidence for any purpose whatsoever including being offered in support of the government's opposition to the Motion to Suppress which was then before the Trial Court. Accordingly, they should not and could not have been properly examined by the trier of fact



without substantial prejudice arising to Appellants.

### CONCLUSION

Appellants submit that for the above reasons a Rehearing should be granted in this case, and that the decision of this Honorable Court heretofore rendered in the instant Appeal be vacated.

Respectfully submitted,

ALEXANDER, INMAN & FINE

By: GARY GOLDMAN and

MAURICE C. INMAN, JR.

Attorneys for Appellants



## CERTIFICATE

I certify that in connection with the preparation of this Petition for Rehearing that I have examined the appropriate Rules of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules. I further certify that the instant Petition is, in my opinion, well founded and not interposed for purposes of delay.

By /s/ Gary Goldman

GARY GOLDMAN





✓ ✓ ✓  
Nos. 20715 & 20733 & 20734

---

**In the United States Court of Appeals  
for the Ninth Circuit**

---

*See Vol.  
3413*

**DANIEL M. MORGAN, ALFRED ZIEGELE,  
HERBERT L. NOLTE**

*vs.*

**UNITED STATES OF AMERICA**

---

**BRIEF FOR APPELLEE**

---

**CECIL F. POOLE,**  
*United States Attorney,  
San Francisco, California*

*Of Counsel*

**PHILIP WILENS  
ALLAN B. STRELLER**  
*Attorneys, Department of Justice,*

---

**FILED**

**FEB 7 1967**

**WM. B. LUCK, CLERK**



## SUBJECT INDEX

	Page
I. Jurisdictional statement .....	1
II. Statement of the case .....	2
III. Relevant law .....	3
IV. Statement of facts .....	3
V. Questions presented .....	4
VI. Summary of argument .....	5
VII. Argument .....	7
A. The Federal Wagering Tax Statutes do not violate the privilege against self-incrimination guaranteed by the Fifth Amendment .....	7
B. The evidence was sufficient to sustain the verdict .....	8
C. The instruction on aiding and abetting was not an amendment of the indictment in violation of the Fifth Amendment .....	13
D. The District Court did not err in refusing to grant appellants' motions for a mistrial based upon the alleged misconduct of counsel for the Government .....	14
E. A prosecution based upon the Wagering Tax Statutes does not violate the right to due process guaranteed by the Fifth Amendment .....	15
F. The remarks of the District Court made in the presence of the jury pertaining to the tapes played at the trial were not prejudicial to the appellants .....	16
G. The District Court did not err in instructing the jury before argument concerning acts and declarations of co-conspirators .....	17
H. The instructions on tax liability were complete and correct .....	18
Conclusion .....	20
Certificate of Responsible Attorney .....	20
Appendix .....	21

## II

### TABLE OF CASES

	Page
<i>Balistreri v. Turner</i> , 227 C.A. 2d 6, 38 Cal. Rptr. 553 (1964) .....	15
<i>Costello v. United States</i> , 352 F.2d 848 (2nd Cir. 1965), cert. granted, 383 U.S. 942, 86 S.Ct. 1195 (1966) .....	7, 8
<i>Dastagir v. Dastagir</i> , 109 C.A. 2d 809, 241 P.2d 656 (1952) .....	15
<i>Diaz-Rosendo v. United States</i> , 357 F.2d 124 (9th Cir., 1966) .....	5, 8
<i>Finn v. United States</i> , 219 F.2d 894 (9th Cir., 1955) .....	19
<i>Grosso v. United States</i> , 358 F.2d 154 (3rd Cir., 1966), cert. granted, — U.S. —, 87 S.Ct. 47 (1966) .....	5, 7, 8
<i>Glasser v. United States</i> , 315 U.S. 60, 62 S.Ct. 457 (1942) .....	5, 8
<i>Herzog v. United States</i> , 235 F.2d 664 (9th Cir., 1956) .....	7, 19
<i>Ingram v. United States</i> , 360 U.S. 672, 79 S.Ct. 1138 (1957) .....	15, 16
<i>Lawrence v. United States</i> , 357 F.2d 434 (10th Cir. 1966) .....	15
<i>Lewis v. United States</i> , 348 U.S. 419, 75 S.Ct. 415 (1955) .....	7
<i>Marchetti v. United States</i> , 352 F. 2d 848 (2nd Cir., 1965), cert. granted January 9, 1967 .....	5
<i>Nye &amp; Nissen v. United States</i> , 336 U.S. 613, 69 S.Ct. 766 (1949) .....	6, 13
<i>Pang v. United States</i> , 209 F.2d 245 (9th Cir. 1953) .....	14
<i>People v. Wells</i> , 100 Cal. 459 (1893) .....	15
<i>Schmidtberger v. United States</i> , 129 F.2d 390 (8th Cir. 1942) .....	6, 14
<i>Sembler v. United States</i> , 332 F.2d 6 (9th Cir. 1964) .....	6, 18
<i>State v. Main</i> , 37 Idaho 449, 216 P. 731 (1923) ....	15
<i>Stoskoff v. Wicklund</i> , 49 N.D. 708, 193 N.W. 312 (1923) .....	15

### III

Cases—Continued	Page
<i>Thomas v. United States</i> , 363 F.2d 159 (9th Cir. 1966) .....	15
<i>United States v. Calamaro</i> , 354 U.S. 51, 77 S.Ct. 1138 (1957) .....	6, 13, 15
<i>United States v. Kahriger</i> , 345 U.S. 22, 73 S.Ct. 510 (1953) .....	7

### STATUTES

#### *Constitution of the United States*

Fifth Amendment .....	4, 7, 15
-----------------------	----------

#### *United States Code*

##### Title 18

Section 2 .....	5, 13
Section 371 .....	2
Section 3231 .....	1

##### Title 26

Chapter 35 .....	2
Section 4401 .....	1, 2
Section 4411 .....	2, 3
Section 7201 .....	1, 2

##### Title 28

Section 1291 .....	1
Section 1294 .....	1

### RULES

#### *Federal Rules of Criminal Procedure*

Rule 30 .....	18
---------------	----





**In the United States Court of Appeals  
for the Ninth Circuit**

---

Nos. 20715 & 20733 & 20734

DANIEL M. MORGAN, ALFRED ZIEGELE,  
HERBERT L. NOLTE

*vs.*

UNITED STATES OF AMERICA

---

**BRIEF FOR APPELLEE**

---

**STATEMENT OF JURISDICTION**

Jurisdiction of the United States District Court is based upon Sections 4401, Title 26, U.S.C. 7201, Title 26, U.S.C., and 3231 of Title 18, U.S.C. The jurisdiction upon appeal of this Circuit Court to review a final judgment of the District Court is predicated upon the grant of jurisdiction given under Section 1291 and 1294 of Title 28, U.S.C.

## STATEMENT OF THE CASE

On June 10, 1965, the Federal Grand Jury charged the defendants Daniel M. Morgan, Alfred Ziegele and Herbert L. Nolte with (1) a violation of Title 18, U.S.C., Section 371; namely, a conspiracy to defraud the United States, and (2) a violation of Title 26, U.S.C., Section 7201; namely, wilful tax evasion, predicated upon the failure of the defendants to comply with the Wagering Tax Act. (Title 26, U.S.C., Chapter 35.)

With respect to Count One, the alleged conspiracy, the substance of this charge was that the defendants conspired to obstruct, impede, etc., the Internal Revenue Service and the Treasury Department in the computation, assessment and the collection of wagering taxes due under U.S. Code, Title 26, Section 4401 and U.S. Code, Title 26, Section 4411.

After trial by jury, each defendant was found not guilty with respect to the conspiracy charge.

Count Two, the charge of wilful tax evasion, in substance alleged that the defendants accepted wagers and that "(4) as principals of the said wagering business, the said defendants were required by law, on or before December 31, 1964, to file a wagering excise tax return, Form 730, with the District Director of Internal Revenue, San Francisco, California, and to pay such wagering excise tax." The second count further alleges that defendants wilfully attempted to evade and defeat the tax, and set forth certain acts allegedly committed by the defendants for the purpose of concealing the size and extent of their wagering business. Among such evidentiary acts

was the failure of the defendants to pay the special occupation tax imposed by Section 4411, Title 26, of the U.S. Code.

Each defendant was convicted on Count Two. Thereafter, each defendant duly renewed and presented to the Court motions for an acquittal and, in the alternative, motions for an order granting a new trial. The motions were denied as to all defendants. On December 21, 1965, judgment was pronounced against each defendant. On December 28, 1965 defendant Nolte's motion for leave to appeal in forma pauperis was granted. On December 28, 1965 defendant Nolte filed his notice of appeal. On or about the 29th day of December, 1965, defendants Morgan and Ziegele filed their notices of appeal from the judgment so entered.

### RELEVANT LAW

(See Appendix, *infra*)

### STATEMENT OF FACTS

Appellants in their Statement of Facts have omitted the following pertinent facts:

1. That Mrs. Holeman testified that Nolte told her that if one week his bettors won more than they lost, then his backers would cover the loss but that in the following weeks he would have to reimburse the backers out of his share of the winnings (T. p. 96).

2. That it was stipulated that the trial court would explain to the jury its remarks concerning the playing of the tapes and further the court would state to the jury that if any juror felt that the court's comments were critical of either side that he was to raise

his hand, and that if any juror raised his hand the court would declare a mistrial (T. p. 334). Thereafter, the court addressed the jury in accordance with the stipulation and no juror raised a hand. (T. p. 337)

3. That Daniel Morgan admitted a prior felony conviction for bookmaking (T. p. 602) and that he knew Ziegele was taking horse bets on the telephone (T. p. 596).

4. That Alfred Ziegele admitted that he had a prior felony conviction for failing to have a wagering tax stamp (T. p. 627).

#### QUESTIONS PRESENTED

1. Whether the Wagering Tax Act violates the Fifth Amendment privilege against self-incrimination?
2. Whether the evidence was sufficient to sustain the verdict?
3. Whether the District Court in instructing on aiding and abetting amended the indictment in violation of the Fifth Amendment?
4. Whether the District Court erred in denying appellants' motions for a mistrial based upon the alleged misconduct of counsel for the government?
5. Whether a prosecution based upon the Wagering Tax Statutes constitutes a denial of the due process rights of the appellants under the Fifth Amendment?
6. Whether the remarks of the Court made in the presence of the jury pertaining to the tapes



played at the trial were prejudicial to the defendants?

7. Whether the District Court erred in instructing the jury before argument concerning acts and declarations of co-conspirators?
8. Whether the District Court's instructions on tax liability were erroneous?

### SUMMARY OF ARGUMENT

1. Certiorari has been granted in *Marchetti v. United States*, — U.S. — and in *Grosso v. United States*, 358 F.2d 154, — U.S. —, 87 S.Ct. 47 (1966) and the cases were argued in the Supreme Court on January 17 and 18, 1967. In those cases the constitutionality of the wagering tax laws are being reviewed by the Supreme Court. Therefore, we suggest that this Court withhold its decision regarding the constitutionality of the wagering tax law until the Supreme Court has ruled in those cases.

2. In considering the contention that a conviction is not supported by substantial evidence, the appellate court must take that view of the evidence which is most favorable to sustaining the verdict of the jury. *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, (1942), *Diaz-Rosendo v. United States*, 357 F. 2d 124 (9th Cir., 1966). The evidence adduced at the trial was clearly sufficient to sustain the conviction of guilty.

3. Under Title 18, Section 2 an aider and abettor is punishable as a principal. It is not necessary to be charged as an aider and abettor in order to be held as

a principal. *Nye & Nissen v. United States*, 336 U.S. 613, 69 S.Ct. 766 (1949).

4. It is neither prejudicial error nor misconduct for a prosecutor to lay a foundation for the admission of evidence which is subsequently excluded on objection. *Schmidtberger v. United States*, 129 F.2d 390 (8th Cir., 1942).

5. The law is clear as to the tax liability of those who operate or assist in the operation of a gambling enterprise. See, *United States v. Calamaro*, 354 U.S. 351, 77 S.Ct. 1138 (1957).

6. It was stipulated that the court would explain to the jury its remarks concerning the tapes and further that the court would state to the jury that if any juror felt the court's comments were critical of either side that he was to raise his hand, and that if any hands were raised the court would declare a mistrial (T. 334). Thereafter, the court addressed the jury in accordance with the stipulation (T. 337). No juror raised a hand (T. 337). It is apparent that the petitioners were in no way prejudiced by the discussion and remarks by the court concerning the playing of the tapes.

7. It is not error to instruct the jury prior to argument provided that the jury is appropriately instructed after argument. *Sembler v. United States*, 332 F.2d 6 (9th Cir., 1964). After argument the jury was correctly instructed on acts and declarations of co-conspirators. They acquitted the appellants of the conspiracy charge. Therefore, even if the instruction was incomplete, the appellants were not prejudiced by the instruction being given prior to argument.



8. In reviewing instructions given to the jury, the appellate court must consider the instructions as a whole. *Herzog v. United States*, 235 F.2d 664 (9th Cir., 1956). The instructions given to the jury relating to the excise tax liability of the appellants were complete and correct.

## ARGUMENT

### I

#### **The Federal Wagering Tax Statutes Do Not Violate the Privilege Against Self-Incrimination Guaranteed by the Fifth Amendment**

In attacking the constitutionality of the wagering tax laws, petitioners are in effect requesting this Court to ignore or overrule the decisions of the Supreme Court in *United States v. Kahriger*, 345 U.S. 22, 73 S.Ct. 510 (1953) and *Lewis v. United States*, 348 U.S. 419, 75 S.Ct. 415 (1955). We assume that this Court, however, as did the Court of Appeals for the Second Circuit in the case of *Costello v. United States*, 352 F.2d 848, will hold itself obliged to follow those cases unless and until they are expressly overruled by the Supreme Court. Certiorari has been granted in the *Costello* case, 388 U.S. 942 and in *Grosso v. United States*, 358 F.2d 154, — U.S. —. Both of those cases have been briefed for the Supreme Court by both sides and were argued on January 17 and 18, 1967.

Since it would appear that the determination of the Supreme Court in those cases will be dispositive of this issue in this case, we would suggest that this

Court withhold its decision herein pending the determination of the *Grosso* case and the case subsequently placed on the docket in lieu of *Costello*.\*

## II

### The Evidence Was Sufficient to Sustain the Verdict

In considering the contention that a conviction is not supported by substantial evidence, the appellate court must take that view of the evidence which is most favorable to sustaining the verdict of the jury. *Glasser v. United States*, 315 U.S. 60, 62 S. Ct. 457 (1942); *Diaz-Rosendo v. United States*, 357 F.2d 124 (9th Cir., 1966). A brief review of some of the evidence adduced at the trial will show that there was sufficient evidence to sustain the jury's verdict of guilty. Mr. Harvey of the Internal Revenue Service testified that the records of the District Director of Internal Revenue for Northern California for the fiscal year starting July 1, 1964 showed no registration, payment of the occupational tax, or excise tax returns for the appellants (T. pp. 27-29). Mr. Zivic testified that pursuant to an understanding with Nolte he placed horse race wagers over the phone with a person named "Shirley" (T. pp. 44-48); that

---

\* The cases in fact argued were those of *Grosso* and James Marchetti. The case of James Marchetti, a co-defendant of *Costello*, was substituted for the *Costello* case subsequent to *Costello*'s death. The Marchetti case raises the constitutionality of the registration and occupational tax statutes. The *Grosso* case raises the question of the constitutionality of the 10% excise tax.

he paid Nolte, or collected from him, depending upon whether he won or lost (T. p. 49). He further testified that when Nolte stopped coming around that Morgan started paying and collecting from him (T. p. 51). Mr. Stathes testified that he placed wagers with Nolte in person and over the phone and that Nolte paid him when he won and collected from him when he lost (T. p. 64).

Mrs. Holeman testified that she worked for Nolte on a phone spot receiving bets which she relayed to Ziegele, first known to her only as "Shirley" (T. pp. 76-77); that Nolte told her that the bettors used nicknames in order to prevent involvement with the "federal people" (T. p. 97); that Nolte was concerned about the "feds" (T. p. 84) and the "tax people" (T. p. 91). She testified that Nolte told her that if one week his bettors won more than they lost, then his backers would cover the loss but that in the following weeks he would have to reimburse the backers out of his share of the winnings (T. p. 96). She testified that Ziegele told her that what she was doing was illegal and that it was income tax evasion (T. p. 103); that Ziegele told her to destroy the records of the bets she made and that Ziegele suggested several ways of hiding the records (T. p. 109). Mrs. Holeman further testified that she asked Ziegele if she could set up a "split book" with Roy Fleet (unknown to Ziegele, Roy Fleet was a Special Agent of the Internal Revenue Service), and that Ziegele said "I have to check with my boss first" (T. pp. 111-113); that Ziegele informed her that he had checked with

his boss and that his boss would call her later (T. p. 114). Mrs. Holeman further testified that Morgan called and said that he was the person who was supposed to call, and that Morgan questioned her about Roy Fleet (T. p. 115). In her testimony she stated she met with Morgan and that Morgan again questioned her about Roy Fleet. At this meeting Morgan described himself to Mrs. Holeman as an "eliminator" and a "screener" for the organization (T. p. 400) and told her that "he was considering dropping Herb Nolte from the organization" (T. pp. 115-117). Mrs. Holeman testified that Ziegele told her "that since he hadn't heard anything to the contrary from Danny Morgan" she could begin to take bets from Roy Fleet (T. p. 117); that after she accepted bets from Roy Fleet, Morgan called her and instructed her "to hold up on Roy Fleet's action" until he could do a little more checking on him (T. p. 119); and that on one occasion she relayed a late bet directly to Morgan who told her "he would take care of it" (T. p. 460).

Daniel Morgan testified that Ziegele asked him to screen Roy Fleet (T. p. 585) that he contacted Mrs. Holeman and screened Roy Fleet (T. p. 587); that he knew Ziegele was taking horse bets on the phone (T. p. 596). He admitted a prior felony conviction for bookmaking (T. p. 602) and also that he had collected money from Mr. Zivic (T. p. 579) and that "Shirley" was the code name of Ziegele (T. p. 601).

Alfred Ziegele admitted that he accepted wagers from Nolte and Mrs. Holeman and from individual bettors (T. p. 614); that he asked Morgan to contact



Mrs. Holeman to screen Roy Fleet; that he used the code name "Shirley" (T. p. 642). He admitted a prior felony conviction for failing to have a tax stamp (T. p. 627).

Herbert Nolte admitted accepting bets from Mrs. Holeman (T. p. 652) and stated that Mrs. Holeman worked on a phone spot receiving wagers for him (T. p. 651); that under his financial agreement with Mrs. Holeman she received twenty per cent of the losing bets (T. p. 685). He admitted that he had relayed bets over the phone to a person called "Shirley" (T. p. 654); that he destroyed the records of bets he had made (T. p. 678). He further admitted that he paid and collected on the bets (T. p. 675) and that he had a prior felony conviction for failing to have a tax stamp (T. p. 659). Nolte also admitted that he had a financial arrangement with a person named Karl and that Karl paid him fifty per cent of the losing bets (T. p. 651).

From the evidence adduced it is clear that the jury had ample basis to conclude that Morgan was the principal in this gambling operation. It was he who telephoned Mrs. Holeman and identified himself as the man who was supposed to call to check out Roy Fleet (Ziegele had previously told her that his boss would call her in regard to Roy Fleet). It was Morgan who instructed Mrs. Holeman to stop taking bets from Roy Fleet until he could check on Fleet more thoroughly. He also told Mrs. Holeman that he was considering dropping Nolte from the organization, and he described himself to her as the "boss", the "eliminator".

The evidence shows that Nolte and Ziegele were important participants in the gambling operation run by Morgan. Nolte paid and collected on bets. He hired Mrs. Holeman to work on a phone spot on a percentage basis. He accepted bets and relayed them to Ziegele through Mrs. Holeman. Ziegele worked on the telephone receiving bets from individual bettors and called Mrs. Holeman daily to collect the bets that she had received. It was Ziegele who had Morgan contact Mrs. Holeman for the purpose of checking out Roy Fleet.

It is apparent that Nolte and Ziegele were aware that a tax was due on the bets that they handled and that they acted affirmatively to conceal that tax liability. Nolte and Ziegele used code names to protect themselves and their bettors. They concealed and destroyed the records of the bets that they handled. Nolte told Mrs. Holeman not to hide her records of the bets in a drawer because the "tax people" would be sure to look there. He advised her not to go to the Square Chair Bar because of the "feds". Ziegele told Mrs. Holeman that what she was doing was illegal and that it was income tax evasion. He told her to destroy the records of the bets she made, and he informed her of several ways of concealing records.

It is submitted that the evidence adduced at the trial clearly shows that Nolte and Ziegele participated with Morgan for profit in this gambling operation and had knowledge of the tax liability and that all three appellants acted affirmatively to conceal that tax liability.



In regard to Nolte, the evidence not only shows that he was an aider and abettor, but that he was also a banker. His income was determined by the number of bets he handled and by the difference between the bettors losses and their winnings. If Nolte's bettors won more than they lost, his backers would put up the money. Then, when his bettors lost more than they won, he had to reimburse his backers for the money that they had put up. It is obvious that Nolte had a direct financial interest in the bets he handled. The bettors were actually betting against Nolte and thus he is seen to be a banker, not a mere writer. See, *United States v. Calamaro*, 354 U.S. 351, 77 S.Ct. 1138 (1957).

### III

#### **The Instruction on Aiding and Abetting Was Not an Amendment of the Indictment In Violation of the Fifth Amendment**

Under Title 18, Section 2, one who aids, abets, counsels, commands, induces, or procures the commission of an offense against the United States is punishable as a principal.

All petitioners contend that in order to convict an individual of aiding and abetting in the commission of a substantive offense, the individual must be charged in the indictment with Title 18 U.S.C. Section 2. In *Nye & Nissen v. United States*, 336 U.S. 613, 69 S.Ct. 766 (1949), where the indictment did not contain any reference to Title 18, Section 2, the Supreme Court found the instruction to the jury concerning Title 18 Section 2 to be entirely proper and

held that the verdict could be supported on the theory that one who aids and abets the commission of a crime is as responsible for the crime as if he committed it directly. See also *Pang v. United States*, 209 F.2d 245 (9th Cir., 1953). It is submitted that the District Court in instructing the jury on aiding and abetting did not amend the indictment.

#### IV

##### **The District Court Did Not Err In Refusing to Grant Appellants' Motions for a Mistrial Based Upon the Alleged Misconduct of Counsel for the Government**

Counsel for the Government in good faith and after laying a foundation offered into evidence "Plaintiff's Exhibit 8" which consisted of reports and memoranda which supplemented the testimony of Mrs. Bonnie Holeman and the tapes in evidence. Following a timely objection by counsels for all appellants, counsel for the Government yielded to their objections to the admission into evidence of Plaintiff's Exhibit 8. It is neither prejudicial error nor misconduct for a prosecutor to lay a foundation for the admission of evidence which is subsequently excluded on objection. *Schmidtberger v. United States*, 129 F.2d 390 (8th Cir., 1942). Counsel in a criminal case has no way of knowing before hand that the evidence which he offers in good faith will be objected to. It is the duty of a prosecutor to offer competent evidence to establish the guilt of the accused, as it is the duty of defense counsel to object to evidence which he feels is inadmissible.

The jury was admonished by the trial judge that they were not to speculate as to the contents of the memoranda (T. p. 464). This is not a situation where a jury has heard either improper impeachment or cross-examination. See e.g., *State v. Main*, 37 Idaho 449, 216 P.731; *People v. Wells*, 100 Cal. 459 (1893); *Dastagir v. Dastagir*, (1952), 109 C.A. 2d 809, 241 P.2d 656; *Balistreri v. Turner*, (1964) 227 C.A. 2d 6, 38 Cal. Rptr. 553; *Stoskoff v. Wicklund*, (1923) 49 N.D. 708, 193 N.W. 312; *Thomas v. United States*, 363 F.2d 159 (9th Cir., 1966); *Lawrence v. United States*, 357 F.2d 434 (10th Cir., 1966). The contents of "Plaintiff's Exhibit 8" were never exposed to the scrutiny of the jury. It is respectfully submitted that the offer into evidence of Plaintiff's Exhibit 8, which was withdrawn upon objection, is not grounds for the granting of a motion for a mistrial.

## V

### **A Prosecution Based Upon the Wagering Tax Statutes Does Not Violate the Right to Due Process Guaranteed by the Fifth Amendment**

Petitioners Morgan and Ziegele argue that the wagering tax statutes are unclear as to what activities they cover, and therefore, that a prosecution based upon these statutes violates the defendants' rights of due process under the Fifth Amendment.

In *United States v. Calamaro*, 354 U.S. 351, 77 S.Ct. 1138 (1957) and again in *Ingram v. United States*, 360 U.S. 672, 79 S.Ct. 1314 (1959) the Supreme Court in no uncertain terms made it clear that

the following persons are liable for the \$50 occupational tax: (1) those who operate the gambling enterprise and against whom the players bet, (the banker); (2) those who actually do the accepting of the bets for the banker, (the writers); and (3) those who have a proprietary interest in a gambling enterprise. Additionally, in *Ingram* the Supreme Court stated that the proprietors of a gambling enterprise are liable for the ten percent excise tax imposed on wagers. Contrary to the assertion of the appellants, the law is abundantly clear. Persons who deal with the bettors and persons who operate or assist in the operation of a gambling enterprise (other than those performing merely clerical functions) are each liable for the occupational tax, and the individuals who operate the enterprise—the bankers, the principals, are liable for the excise tax.

It is clear that all the petitioners were either directly liable for the excise tax or were aware of the tax liability and took active measures to conceal that liability.

## VI

### **The Remarks of the District Court Made In the Presence of the Jury Pertaining to the Tapes Played at the Trial Were Not Prejudicial to the Appellants**

Petitioners Morgan and Ziegele argue that the discussions and remarks by the court in the presence of the jury concerning the playing of the tapes were prejudicial to the defendants. While it can be argued that, in fact, the remarks of the court were not prejudicial, nevertheless it is noted that it was stipulated the court would explain to the jury its remarks con-



cerning the tapes and further that the court would state to the jury that if any juror felt that the court's comments were critical of either side that he was to raise his hand, and that if any hands were raised the court would declare a mistrial (T. p. 334). Thereafter, the court addressed the jury in accordance with the stipulation (T. p. 337). Since no juror raised a hand (T. p. 337), it is clear, (whatever view might be taken of the court's remarks under other circumstances) under the facts disclosed in this case, that the jury attached no particular significance to the court's remarks and that the petitioners were in no way prejudiced thereby.

## VII

### **The Trial Court Did Not Err In Instructing the Jury Before Argument Concerning Acts and Declarations of Co-Conspirators**

Petitioner Nolte argues that the trial court erred in instructing the jury before argument on acts and declarations of co-conspirators. During the course of the trial, the jury, on several occasions, was instructed that the acts and declarations of one defendant could not be held to apply to any other defendant. For the purpose of clarification, prior to argument and only after reiterating that the above-stated rule was still in effect, the Court advised the jury of the instruction concerning acts and declarations of co-conspirators that it intended to give after argument (T. p. 773-775). The Court emphasized to the jury that they would be formally instructed after argu-

ment and that they were not to give undue consideration to the anticipated instruction. After argument the jury was formally instructed concerning the acts and declarations of co-conspirators. Rule 30, Federal Rules of Criminal Procedure does not preclude a Court from instructing the jury during the trial provided that the jury is appropriately instructed after argument. See, *Sembler v. United States*, 332 F.2d 6 (9th Cir. 1964).

The jury was correctly instructed on acts and declarations of co-conspirators by the Court after argument (T. p. 917). They acquitted the appellants of the conspiracy charge. Therefore, even if the anticipated instruction was incomplete the appellants were not prejudiced by the instruction being given prior to argument.

## VIII

### **The Instructions on Tax Liability Were Complete and Correct**

Petitioner Nolte argues that the instructions on tax liability were erroneous.

In instructing the jury, the trial court read the indictment in its entirety to the jury (T. p. 896-908). Count II of the indictment, as read to the jury, specifically charged the appellants with being principals in the business of accepting wagers. Two of the instructions<sup>1</sup> given to the jury regarding Count II re-

---

<sup>1</sup> A) Now, with regard to the ten percent excise tax on wagers, the following persons are liable under the law—one or more of the statutes I read to you—for that tax: One, any



ferred specifically to the business of accepting wagers. Viewing the instructions as a whole, the jury could not have failed to understand that in order to convict the defendants, they would first have to be convinced beyond a reasonable doubt either that defendants were persons engaged in the business of accepting wagers and had willfully failed to pay the excise taxes due on wagers accepted and had taken affirmative action to conceal their tax liability or had aided and abetted a person so liable in failing to pay such tax and to conceal such tax liability. In reviewing instructions given to the jury, the appellate court must consider the instructions as a whole. *Herzog v. United States*, 235 F.2d 664 (9th Cir., 1956). In addition, the refusal of an instruction which in substance has been covered in the trial court's charge is not error. *Finn v. United States*, 219 F.2d 894 (9th Cir., 1955). It is submitted that the instructions given to the jury relating to the excise tax liability of the appellants were complete and correct.

---

person who conducts a wagering pool or has a proprietary interest in such a pool is liable for the tax on wagers placed with the pool. Two, any person *who is engaged in the business of accepting wagers* is liable for the excise tax on all wagers placed with him (T.P. 920). (emphasis ours)

B) Now, in determining whether or not a person is engaged in the business of accepting wagers, I instruct you that the fact that a person is engaged in one form of employment does not preclude him from being engaged in some other pursuit or endeavor at the same time. Nor do the facts, if they are shown, that a person has only a few customers force the conclusion that he is not engaged in a particular business or occupation (T.P. 921).

CONCLUSION

It is respectfully submitted that the judgment of the court below should be affirmed.

CECIL F. POOLE,  
*United States Attorney,  
San Francisco, California*

PHILIP WILENS  
ALLAN B. STRELLER  
*Attorneys, Department of Justice,  
Of Counsel*

JANUARY, 1967

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rule 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

---

PHILIP WILENS,  
*Attorney,  
Department of Justice*

## APPENDIX A

## CHAPTER 35—TAXES ON WAGERING

## Subchapter A—Tax on Wagers

## Section 4401. Imposition of tax

(2) Wagers.—There shall be imposed on wagers, as defined in Section 4421, an excise tax equal to ten per cent of the amount thereof.

(b) Amount of wager.—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included: except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax.—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under Section 4412 who receives wagers for or on behalf of another person without having registered under Section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him.

## Section 4402. Exemptions

(Not applicable)

## Section 4403. Record requirements

Each person liable for tax under this subchapter shall keep a daily record showing the gross amount of all wagers on which he is so liable, in addition to all other records required pursuant to Section 6001(a).

## Section 4404. Territorial extent

The tax imposed by this subchapter shall apply only to wagers

- (1) accepted in the United States, or
- (2) placed by a person who is in the United States
  - (a) with a person who is a citizen or resident of the United States, or
  - (b) in a wagering pool or lottery conducted by a person who is a citizen or resident of the United States.

## Section 4405. Cross references

(Not applicable)

## Subchapter B—Occupational Tax

### Section 4411. Imposition of tax

There shall be imposed a special tax of \$50.00 per year to be paid by each person who is liable for tax under Section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

## Section 4412. Registration

(a) *Requirement.*—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for or on on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) *Firm or company.*—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) *Supplemental information.*—In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

Section 4413. Certain provisions made applicable

(Not applicable)



## Section 4414. Cross references

(Not applicable)

## Subchapter C—Miscellaneous Provisions

## Section 4421. Definitions

For purposes of this chapter—

(1) *Wager*.—The term “wager” means—

(a) any wager with respect to a sports event or contest placed with a person engaged in the business of accepting such wagers,

(b) any wager placed in a wagering pool with respect to a sports event or contest, if such pool is conducted for profit, and

(c) any wager placed in a lottery conducted for profit.

(2) *Lottery*.—The term “lottery” includes the numbers games, policy, and similar types of wagering. The term does not include—

(a) any game of a type which usually

(i) the wagers are placed,

(ii) the winners are determined, and

(iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such games, and

(b) any drawing conducted by an organization exempt from tax under Sections 501 and 521, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.



Section 4422. Applicability of federal and state laws

The payment of any tax imposed by this chapter with respect to any activity shall not exempt any person from any penalty provided by a law of the United States or of any State for engaging in the same activity, nor shall the payment of any such tax prohibit any State from placing a tax on the same activity for State or other purposes.

Section 4423. Inspection of books

Notwithstanding Section 7605(b), the books of account of any person liable for tax under this chapter may be examined and inspected as frequently as may be needful to the enforcement of this chapter.

CHAPTER 75—CRIMES, OTHER OFFENSES, AND FORFEITURES

Subchapter A—Crimes

Section 7201. Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than five years, or both, together with the costs of prosecution.

Section 7203. Willful failure to file return,  
supply information or pay tax

Any person required under this title to pay any estimated tax or tax, required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of Section 6015 or Section 6016, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than one year, or both, together with the costs of prosecution.

NO. 20746

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

ROBERT ALAN LAWRENCE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
CENTRAL DIVISION

---

MANUEL L. REAL,  
United States Attorney,  
JOHN K. VAN DE KAMP,  
Assistant U. S. Attorney,  
Chief, Criminal Division,  
ROBERT L. BROSIO,  
Assistant U. S. Attorney,  
Assistant Chief, Criminal Division,  
WARREN P. REESE,  
Assistant U. S. Attorney,

600 U. S. Court House,  
312 North Spring Street,  
Los Angeles, California 90012

Attorneys for Appellee,  
United States of America.

FILED

JUL 20 1966

W. B. LUCK, CLERK

*See Vol. 3377*



N O. 2 0 7 4 6

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

ROBERT ALAN LAWRENCE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
CENTRAL DIVISION

---

MANUEL L. REAL,  
United States Attorney,  
JOHN K. VAN DE KAMP,  
Assistant U. S. Attorney,  
Chief, Criminal Division,  
ROBERT L. BROSIO,  
Assistant U. S. Attorney,  
Assistant Chief, Criminal Division,  
WARREN P. REESE,  
Assistant U. S. Attorney,

600 U. S. Court House,  
312 North Spring Street,  
Los Angeles, California 90012

Attorneys for Appellee,  
United States of America.





## TOPICAL INDEX

	<u>Page</u>
Table of Authorities	ii
JURISDICTION AND HISTORY OF THE CASE	1
STATEMENT OF FACTS	2
QUESTIONS RAISED ON APPEAL	7
ARGUMENT	9
I THE TRIAL COURT PROPERLY ADMITTED INTO EVIDENCE THE CERTIFIED PHOTO- GRAPHIC COPY OF APPELLANT'S OFFICIAL SELECTIVE SERVICE FILE.	9
II AT THE TIME APPELLANT WAS ORDERED TO REPORT FOR INDUCTION INTO MILITARY SERVICE HE WAS PROPERLY CLASSIFIED 1-A.	11
A. The Local Board Was Not Required to Consider Appellant For Student Deferment and Placement in Class 1-S When He Submitted No Evidence That He Was a College Student Satisfactorily Pursuing a Full-Time Course.	12
III EVIDENCE OF APPELLANT'S ATTEMPT TO OBTAIN RECLASSIFICATION AFTER HIS REFUSAL TO SUBMIT TO INDUCTION IS IRRELEVANT TO THE QUESTION OF WHETHER HIS REFUSAL CONSTITUTED A VIOLATION OF LAW.	14
IV ASSUMING ARGUENDO THAT SUBSEQUENT ACTION BY THE BOARD WAS RELEVANT TO THE ISSUE OF APPELLANT'S GUILT, AND THE TRIAL COURT SHOULD HAVE CONSIDERED THE LEGALITY OF THE LOCAL BOARD'S ACTION IN DECLINING TO REOPEN APPELLANT'S CLASSIFICATION, THERE WAS NO VIOLATION OF DUE PROCESS OF LAW.	18
CONCLUSION	24
CERTIFICATE	24



## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Boyd v. United States, 269 F. 2d 607 (9 Cir. 1959)	20
Cox v. United States, 332 U. S. 442 (1947)	16, 20
Dickinson v. United States, 346 U. S. 389 (1953)	21
Estep v. United States, 327 U. S. 114 (1946)	21
Feuer v. United States, 208 F. 2d 719 (9 Cir. 1955)	16
Fleming v. United States, 344 F. 2d 912 (10 Cir. 1965)	19
Kariakiu v. United States, 261 F. 2d 263 (9 Cir. 1958)	10
Keene v. United States, 266 F. 2d 378 (10 Cir. 1959)	17
La Porte v. United States, 300 F. 2d 878 (9 Cir. 1962)	10
Olender v. United States, 210 F. 2d 795 (9 Cir. 1954)	10
United States v. Biesiada, 247 F. Supp. 599 (S. D. N. Y. 1965)	17
United States v. Borisuk, 206 F. 2d 338 (3 Cir. 1953)	10
United States v. Schoebal, 301 F. 2d 31 (7 Cir. 1953)	20
United States v. Steeger, 380 U. S. 163 (1964)	21
Witmer v. United States, 348 U. S. 375 (1955)	21
Wyman v. La Rose, 223 F. 2d 849 (9 Cir. 1955)	16



Page

Yaich v. United States, 283 F.2d 613 (9 Cir. 1960)	10
---	----

Statutes

Title 18, United States Code, §3231	2
Title 28, United States Code, §1291	2
Title 28, United States Code, §1294	2
Title 28, United States Code, §1733	9
Title 50, United States Code, Appendix §462	1, 2, 10, 23
Universal Military Service and Training Act (1951), as amended, §6(i)(2)	12

Rules

Federal Rules of Civil Procedure, Rule 44(a)	9
Federal Rules of Criminal Procedure, Rule 27	9

Regulations

32 Code of Federal Regulations:

§1622.1(c)	11
§1622.10	11
§1622.15	12
§1625.2	16, 19
§1925.4	19





N O. 2 0 7 4 6

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

ROBERT ALAN LAWRENCE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

JURISDICTION AND HISTORY  
OF THE CASE

---

Appellant was charged by indictment 35368-CD filed October 13, 1965, in the United States District Court for the Central Division of the Southern District of California, with knowingly failing and neglecting to perform a duty required of him as a registrant under the Universal Military Training and Service Act and the regulations thereunder, namely, having been classified 1-A, refusing to be inducted into the armed forces as he was notified and ordered to do on June 22, 1965, in violation of United States Code, Title 50, Appendix, Section 462.

Appellant was represented by counsel at all stages of the proceedings from the time of his arraignment and plea. Jury was



duly waived, and the case was tried by the Honorable Peirson M. Hall, United States District Judge, on November 30, 1965. Appellant was found guilty on that same date and thereupon sentenced and committed for a term of three years. Notice of appeal was timely filed, and the appellant was released on bond pending appeal.

Jurisdiction of the trial court was founded upon United States Code, Title 50, Appendix, Section 462 and Title 18, Section 3231. This court has jurisdiction to review the case on appeal pursuant to Sections 1291 and 1294, Title 28, United States Code.

### STATEMENT OF FACTS

At the time of trial the Government offered in evidence a photographic copy of the official Selective Service System file for the appellant, which copy had attached to it a certificate by Captain T. D. Proffitt, U.S. A.F. (Ret.), the legal custodian thereof, that it was a full, true and correct copy of the original file. Also attached was a certificate (and seal) of the Staff Secretary, Headquarters, Southern Area - Selective Service System, to the effect that Captain Proffitt had legal custody of the original file (Cf. Exhibit 1 and "CERTIFICATE" attached). This file and testimony by the appellant during trial indicated the following events with respect to the appellant's registration status in the Selective Service System:



He was registered January 19, 1962 (F. 1-2) <sup>1/</sup> and thereafter filed a Classification Questionnaire on April 7, 1964 (F. 4-11). In the section designated "Series VIII - CONSCIENTIOUS OBJECTOR", appellant did not claim to be a conscientious objector; neither did he claim to be a full-time student in the section of said questionnaire designated "Series IX - EDUCATION" (F. 7). The Minutes of Actions by Local Board (F. 11) indicate that on June 8, 1964, appellant was classified 1-A. Notice of such classification was thereafter sent and received by appellant (F. 11 - Form 110 (Notice of Classification) sent June 11, 1964; R. T. 10). <sup>2/</sup> Although appellant was aware of his right to appeal, no appeal was filed (F. 11; R. T. 10).

On April 26, 1965, appellant was sent an Order to Report for Induction on May 25, 1965 (F. 18). Appellant responded to this order with a letter advising the local board that he could not comply, asserting that he would not permit himself to be trained as a PROFESSIONAL KILLER (Emphasis appellant's F. 19). The Order to Report for Induction was remailed on May 14, 1965 (F. 19(a)). In a letter dated May 19, 1965, appellant requested postponement of his induction date in order that he might complete the then current school semester. This letter also contained information regarding his student status (F. 21-25). Although the letter states that appellant was accepted as a full time student at

---

<sup>1/</sup> "F." refers to Selective Service File.

<sup>2/</sup> "R. T." refers to Reporter's Transcript of Proceedings.





San Francisco State College (F. 21), the accompanying communication from the Office of Admissions, San Francisco State College (F. 25) shows he was regarded as a continuing student, but does not specify his enrollment status. The Student Certificate from the University of Southern California indicates that on May 18, 1965, appellant was a part-time student (F. 23 - Items 2 and 3 of SSS FORM 109).

On May 20, 1965, the Local Board sent notice to appellant that induction was postponed until the June 1965 induction call date to be announced by the board. The stated reason for the postponement was to allow appellant to complete the current college semester (F. 27 and 28). The Local Board on May 26, 1965, sent appellant a notice to report for induction on June 22, 1965 (F. 30). Appellant appeared at the induction station on that date and at that time expressly refused to submit to induction on the basis of his "personal moral convictions" (F. 31-33).

Appellant requested and obtained SSS Form 150 (Special Form for Conscientious Objector) on June 28, 1965, six days after his refusal to submit to induction (F. 34). The completed form was filed with the Local Board on June 30, 1965 (F. 35-44). On that same date appellant requested reopening of his classification (R. 47).

In Series II of the Special Form for Conscientious Objector - RELIGIOUS TRAINING AND BELIEF, appellant, in Item 2 (F. 35-37) characterizes the nature of his belief as being the notion that any law (referring presumably to the Universal Military



Training and Service Act) opposing his conception of natural justice is illegal and that one is subject to the displeasure and punishment of the creator of natural law if any illegal act (violation of natural law) is committed. Such an act is classified as sinful and upsetting of nature. Man is charged to have upset nature by destructive acts and society is said presently to be "subjected to the punishment of the supreme being". Appellant proceeds to quote numerous writers expounding upon the nature of religion and religious duties. Then he indicates that he must act according to his religion. He says this without further definition as to what his religious relief involves. He concludes with a statement to the effect that his belief in a supreme being involves duties to him which are superior to those arising from any human relation.

In Item 3 (F. 38) appellant, in explaining how, when and from whom or from what source he received the training and acquired the belief which is the basis for his claim, states that he received the training and acquired the belief "by applying interpretation, organization and reason to everything in life which (he has) perceived".

In Item 4 (F. 38) appellant specifies himself as the individual upon whom he relies most for religious guidance.

Item 5 (F. 38-40) requests a statement of circumstances, if any, under which the registrant believes in the use of force. Appellant defines "force" (in the context he apparently believes it is used in the form) as "violence" i. e. the "unjust exercise of force, usually with vehemence or outrage" (F. 40). He states,



effectively, that he would never resort to violence.

Item 6 requests a description of the actions and behavior in the registrant's life which, in his opinion most conspicuously demonstrate the consistency and depth of his religious convictions. Appellant responds (F. 38 and 41) stating that whenever he has been confronted with a situation which demanded an act of force (violence) he has followed his religious convictions for guidance. To illustrate his point, he states that he has never been in a physical fight, asserting that the circumstances involved have shown him he would have acted against his "religious convictions" otherwise. He states, in conclusion, that he has always been "an honest and sincere person".

Finally, in Item 7, there is an inquiry as to previous written or oral public expressions of the views outlined, and appellant solely cited June 28, 1965, as the occasion of expression of these views, when he uttered them in writing in the office of his attorney (F. 38).

The Local Board reviewed the material contained in appellant's Special Form for Conscientious Objector (F. 11) and advised appellant of its opinion that the facts presented did not warrant reopening or reclassification of his case (F. 72).

At trial, the appellant testified that at the time of his classification he had not crystallized certain moral convictions into religious beliefs that might constitute a basis for conscientious objection (R. T. 10). He further testified that up to the time he filed the Special Form for Conscientious Objector (June 30, 1965),





he was still in process of gathering his thoughts and crystallizing them (R. T. 11). At the time he was required to submit to induction he refused for reasons which he characterized as moral convictions against killing his fellow man (R. T. 16-17). According to his testimony, he apparently first came to the conclusion that he believed in a supreme being and had duties to such supreme being which were superior to those arising from any human relation after his refusal to submit to induction and at the time of his request for the special form on June 28, 1965 (F. 35-37; R. T. 11-17) (emphasis added).

### QUESTIONS RAISED ON APPEAL

Appellant has specified two errors (See Opening Brief, p. 4): 1) The District Court erred in the admission into evidence of the Selective Service System file, and 2) The District Court erred in failing to grant the motion for judgment of acquittal.

More precisely, the following questions are raised on appeal:

1. Was a photographic copy of the official Selective Service System file for the appellant, attested by the officer having legal custody of the record as being a full, true and correct copy of the original, and accompanied by a certificate that such officer has the custody, admissible evidence of such record?
2. Did the local board illegally deny the 1-S classification in appellant's case where no evidence that he was a college



student satisfactorily pursuing a full-time course was submitted?

3. Was the trial court required to consider evidence of conscientious objection to military service where the appellant did not initially claim to be a conscientious objector and never indicated to the local board prior to and including the time he refused to submit to induction that he was a conscientious objector?

4. Assuming that the action of the local board in refusing to reopen classification on a claim of conscientious objection presented after appellant's refusal to submit to induction was relevant to the issue of his guilt;

a. Did the local board abuse its discretion in declining to reopen classification after appellant's refusal to submit to induction, in the absence of evidence of any change of status resulting from circumstances over which appellant had no control?

b. Did the local board abuse its discretion in concluding that the new facts presented by appellant relative to his purported religious belief did not warrant reopening or reclassification?



## ARGUMENT

I        THE TRIAL COURT PROPERLY ADMITTED INTO EVIDENCE THE CERTIFIED PHOTOGRAPHIC COPY OF APPELLANT'S OFFICIAL SELECTIVE SERVICE FILE.

---

Rule 44(a), Federal Rules of Civil Procedure, provides that an official record or an entry therein, when admissible for any purpose, may be evidenced by a copy attested by the officer having legal custody of the record, and accompanied with a certificate that such office in which the record is kept is within the United States, the certificate may be made by any public officer having a seal of office and having official duties in the political subdivision in which the record is kept, authenticated by the seal of his office.

Title 28, United States Code, Section 1733 provides that records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept. Rule 1733 also provides that properly authenticated copies of any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the originals thereof.

Rule 27, Federal Rules of Criminal Procedure provides that an official record or any entry therein may be proved in the same manner as in civil actions.





Appellant contends the trial court committed error by admitting into evidence a bound photographic copy of his original selective service file. This document had been attested and certified in compliance with the above mentioned rules of procedure (See Exhibit 1). It is not clear upon what grounds appellant contends the document fell short of conformance with applicable laws relating to its admission in evidence. It suffices to point out that this circuit has previously approved the proposition that a duly authenticated copy of the registrant's selective service file is admissible in a prosecution for violation of Title 50 Appendix United States Code, Section 462.

Yaich v. United States, 283 F.2d 613

(9 Cir. 1960);

Kariakin v. United States, 261 F.2d 263

(9 Cir. 1958);

La Porte v. United States, 300 F.2d 878

(9 Cir. 1962);

Olender v. United States, 210 F.2d 795

(9 Cir. 1954).

See also:

United States v. Borisuk, 206 F.2d 338

(3 Cir. 1953).



II      AT THE TIME APPELLANT WAS  
ORDERED TO REPORT FOR INDUC-  
TION INTO MILITARY SERVICE HE  
WAS PROPERLY CLASSIFIED 1-A.

---

32 Code of Federal Regulations, Section 1622.10 provides that every registrant who has failed to establish to the satisfaction of the local board, subject to appeal, that he is eligible for classification in another class, shall be placed in class 1-A: "Available for military service."

It is the local board's responsibility to decide, subject to appeal, the class in which each registrant shall be placed. Each registrant is considered as available for military service until his eligibility for deferment or exemption from military service is clearly established to the satisfaction of the local board. 32 Code of Federal Regulations, Section 1622.1(c).

It apparently is not argued that the information contained in appellant's classification questionnaire (F. 4-11) justified any classification but that of 1-A. Series VIII of the questionnaire (F. 7) does not reflect a claim to be a conscientious objector, and Series IX (F. 7) does not contain an assertion that appellant was a full-time student. No other basis for determent or exemption was shown.



A.       The Local Board Was Not Required  
          to Consider Appellant For Student  
          Deferment and Placement in Class  
          1-S When He Submitted No Evidence  
          That He Was a College Student Satis-  
          factorily Pursuing a Full-Time Course.

---

The Universal Military Service and Training Act (1951), as amended, Section 6(i)(2) and 32 Code of Federal Regulations, Section 1622.15(b) provide that any registrant who, while satisfactorily pursuing a full-time course of instruction at a college or university, is ordered to report for induction during the academic year, shall be placed in classification 1-S.

Appellant would persuade the court to believe that the local board should have classified him 1-S after he was ordered to report for induction, but in lieu thereof granted him a postponement of induction. He claims that the local board considered such action to be equivalent to classification 1-S. (There is no such indication in the record.)

Appellant's order to report for induction was sent to him on April 26, 1965. After appellant notified the local board of his inability to comply with the induction order, because he would not permit himself to be trained as a "professional killer", the order was remailed and appellant thereafter specifically requested postponement of his induction date in order that he might complete the current semester (F. 18-23). It is noteworthy that appellant did not request reclassification as 1-S. He did not submit any evidence that he was a full-time student in any college or university.





The Student Certificate from the University of Southern California (F. 23 - items 2 and 3) clearly describes his status as a part-time, not a full-time student.

The notice from San Francisco State College showing that appellant was regarded as a continuing student does not describe his enrollment status, as indeed it could not since he had not at that time enrolled in a continuing course of study (F. 21). Appellant was not qualified for consideration unless he received a notice to report for induction during the academic year while engaged in a full-time course of study. The appellant not being enrolled in courses at San Francisco State College at the time the induction order was received, could not rely on any status in that school as a basis for 1-S classification. It is evident that appellant was not entitled to 1-S classification, and the local board was justified in not so classifying appellant.

Appellant complains that he was deprived of an opportunity to submit a conscientious objector form because he was not reclassified 1-S. He maintains that a 1-S classification would have cancelled the order to report for induction, and he would eventually be reclassified 1-A, affording an opportunity to perfect an administrative appeal.

It is significant that appellant makes no contention that he desired to establish a conscientious objector's claim at that time. In his testimony at trial, he indicated that his religious views had not "crystallized" until sometime in June, a time subsequent to his request for postponement. Indeed, at the time of the request



for postponement of induction appellant had apparently accepted the prospect of induction. Whether he would have submitted a conscientious objector's claim if classified 1-S is entirely speculative. The contention now that he would have done so is manifestly self-serving.

In any event, the administrative remedies to which appellant failed to avail himself are no criteria for judging the validity of the action of the board. The sole question is whether or not appellant qualified for a 1-S classification, and the evidence clearly shows he was ineligible.

III EVIDENCE OF APPELLANT'S ATTEMPT  
TO OBTAIN RECLASSIFICATION AFTER  
HIS REFUSAL TO SUBMIT TO INDUC-  
TION IS IRRELEVANT TO THE QUES-  
TION OF WHETHER HIS REFUSAL  
CONSTITUTED A VIOLATION OF LAW.

---

The trial court was not required to consider action of the local board relative to a claim of conscientious objection filed after appellant's refusal to submit to induction. Evidence of such action was no relevancy as a defense to the criminal conduct charged. Appellant seeks to create the illusion that action of the board violated due process of law with respect to his classification and thereby rendered the order to report for induction illegal. However, the action of the board was unassailable when considered in view of the evidence it had before it at all times preceding appellant's refusal to submit to induction.



Unexceptionally, in the cases cited by appellant to support his position, the registrant has made some effort to lay a factual basis for his objection to induction before the time he is ordered to submit to induction. Appellant made no effort to establish a claim as a conscientious objector prior to his refusal to submit to induction. He seeks to explain this omission by an extraordinary argument posed by counsel at trial (R. T. 19).

The proposition suggested was that prior to the time appellant was ordered to report for induction he possessed a religious belief upon which was based a conscientious objection qualifying him for exemption from military service (R. T. 19). What prevented appellant from making this circumstance known to the local board? Counsel's argument was that appellant was not aware of what entitled a registrant under the law to exemption on the basis of conscientious objection (R. T. 19). But, appellant, in his testimony, asserted that his views had not crystallized prior to June 1965 (R. T. 10). We are thus urged to the conclusion that appellant was simply not aware that his views were actually attributable to a religious belief, thus disabling him from articulating his convictions in terms of such a belief. Even if he perceived the religious character of his convictions, the argument proceeds, he could not have seized the opportunity to exercise his rights, because he was not aware that his views qualified for conscientious objector's status. The board cannot be criticized for acting reasonably upon information available to it. The case should be evaluated on the basis of 1) the local board's action up to the time





of induction, and 2) the appellant's behavior in defiance of the board's action. (See Cox v. United States, 332 U.S. 442, 454 (1947)).

Appellant implies that the consideration of his case should now be broadened to comprehend assessment of events occurring after his refusal to submit to induction. Should the local board have perceived the possibility that appellant's conscientious objector's claim might reveal a former status different from that indicated by previously submitted evidence? Was the local board then expected to nullify the induction order and disregard appellant's refusal to submit, pending evaluating of his implicit claim of previous and continuing conscientious objection? Would such an approach promote orderly administration of the Act? Would not such an approach open the door to spurious claims of prior exempt status, nullifying previously executed induction processes?

The probability of claims of eligibility for exemption being submitted after mailing of the order to report for induction was anticipated by regulation. 32 Code of Federal Regulations, Section 1625.2 provides that the classification of a registrant shall not be reopened after the local board has mailed the registrant an order to report for induction, unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which he has no control. This regulation has been upheld as applying to requests to reopen on claim of conscientious objection. Wyman v. La Rose, 223 F.2d 849 (9 Cir. 1955); Feuer v. United States, 208 F.2d 719 (9 Cir. 1955); United



States v. Biesiada, 247 F. Supp. 599 (S.D.N.Y. 1965). In Keene v. United States, 266 F.2d 378 (10 Cir. 1959), the court stated at pages 383-384:

"It does not seem unreasonable or derogatory to the spirit and purpose of the exempting statute to provide by regulation that no request for reopening and reclassification shall be entertained after notice to report for induction is mailed. Otherwise, the whole machinery of the selective service process may conceivably be disrupted by last minute changes in status for purposes of avoidance. Such is the manifest purpose of the proviso in Regulation 1625.2. We think the Regulations have application to a conscientious objector's claim as all other claims for a change in status. It seems also entirely consistent with the procedural safeguards provided in the selective service process to say that the circumstances relied upon to show a change in status must have occurred after the induction notice was mailed."

The evidence introduced at trial thus clearly establishes the appellant's guilt. Any evidence purporting to show conscientious objection which was submitted after refusal to submit to induction, the principal unlawful act, is irrelevant and not entitled to consideration as a defense to the charge. The trial court did not therefore err in denying the motion for judgment of acquittal.



IV      ASSUMING ARGUENDO THAT SUBSEQUENT ACTION BY THE BOARD WAS RELEVANT TO THE ISSUE OF APPELLANT'S GUILT, AND THE TRIAL COURT SHOULD HAVE CONSIDERED THE LEGALITY OF THE LOCAL BOARD'S ACTION IN DECLINING TO REOPEN APPELLANT'S CLASSIFICATION, THERE WAS NO VIOLATION OF DUE PROCESS OF LAW.

---

On June 22, 1965, appellant refused to submit to induction (F. 31). On June 30, 1965, he filed a special form for conscientious objector along with a written request that his classification be reopened (F. 35-44, 47). The local board mailed a notice to appellant on July 12, 1965, indicating that it had considered the new facts presented by him and reached the opinion that reopening or reclassification was not warranted (F. 72). The Minutes of Action by the Local Board (F. 11) indicate that all three members of the board met and reviewed appellant's status after receipt of the completed conscientious objector form, and voted unanimously not to reopen.

Appellant charges that the local board abused its discretion in declining to reopen his classification and thereby deprived him of the right to appellate review of his classification. There is no quarrel with the principle that arbitrary and capricious action by a local board in refusing to reopen a classification constitutes a violation of due process of law and is action in excess of its jurisdiction, but the cases cited by appellant afford no helpful guidelines here. The two District Court cases cited shed no light, for instead of outlines of pertinent facts, appellant has supplied the legal





conclusions of the court (Appellant's Opening Brief, pp. 16-17).

The local board shall not reopen a registrant's classification when, upon a registrant's written request to reopen and consider anew his classification, the facts presented would not in the opinion of the board justify a change in classification. 32 Code of Federal Regulations, Section 1925.4. The classification of a registrant shall not be reopened after the local board has mailed the registrant an order to report for induction unless the local board first specifically finds there has been a change in registrant's status resulting from circumstances over which he has no control. 32 Code of Federal Regulations, Section 1625.2.

There was no evidence of a change in appellant's status before the board at the time it reviewed the new facts presented by him. Appellant has the burden to establish his right to an exemption. Fleming v. United States, 344 F.2d 912 (10 Cir. 1965). It is submitted that it is also incumbent upon the registrant to present evidence of a change in status resulting from circumstances over which he has no control if he seeks to have his classification reopened after mailing of the order to report for induction. It would appear that appellant was less than diligent, and under the circumstances has a heavier burden of persuasion where he has made no effort to have the board reconsider his classification until after committing the act charged herein to be a violation of law. His special form for conscientious objector fails under the most careful scrutiny to reveal anything suggesting a change in status. On the other hand, it indicates the presence of an unarticulated



attitude which arguably has persisted for some substantial period of time.

Appellant may propose that a change in status beyond his control occurred on June 28, 1965; he realized he possessed a religious belief which he theretofore mistakenly assumed was inadequate to form a basis for exemption. No such evidence was before the board, however, and the inquiry here is whether or not the board had a basis in fact to support its action. See Cox v. United States, 332 U.S. 442, 454 (1947).

Absent any change in status resulting from circumstances over which appellant had no control, the board cannot reopen classification. It is submitted that the case is controlled by this court's previous ruling in Boyd v. United States, 269 F.2d 607 (9 Cir. 1959), which involved a tardy claim of conscientious objection and refusal to reopen classification. See also United States v. Monroe, 150 F.Supp. 785 (S.D. Cal. 1957).

The appellant's position that the prompting of a registrant's conscience constitute a change of status over which the registrant has no control was also considered in United States v. Schoebal, 301 F.2d 31 (7 Cir. 1953). There the court held that such a view would require so strained an interpretation of the applicable regulations that reason dictated its complete rejection.

If it is found that there was evidence supporting a specific finding of a change in appellant's status beyond his control, the question remains whether the board acted in excess of its jurisdiction in concluding that the new facts presented by the appellant did



not warrant reopening or reclassification.

The question of jurisdiction is reached only if there is no basis in fact for the board's opinion and for continuing appellant in class 1-A. See Estep v. United States, 327 U.S. 114 (1946). The task of the courts is to search the record for some affirmative evidence to support the local board's finding, and the courts may properly insist that there be some proof that is incompatible with the registrant's proof of exempt status. His own admissions may be considered by the board as a basis for an inference as to appellant's sincerity and as to qualification of his professed conscientious objection in terms of statutory requirements. Dickinson v. United States, 346 U.S. 389, 396-397 (1953); Witmer v. United States, 348 U.S. 375 (1955).

Therefore, if a review of the record before the board indicates any basis in fact for the board's conclusion that appellant's professed belief failed to meet the test of United States v. Seeger, 380 U.S. 163 (1964), that it was a sincere and meaningful belief which occupied in the appellant's life a place parallel to that filled by the God of those admittedly qualifying for the exemption, judicial inquiry is at an end and the decision of the board must be considered on the evidence as having been made in conformity with applicable regulations and final, even though it may have been erroneous. Estep v. United States, supra, pages 122-123.

Serious question as to the appellant's sincerity is raised by the inconsistencies in his own statements and position. The fact that he made no effort to establish his claim until after refusal





to submit to induction suggests the probability that he has resorted to the expedient of filing a conscientious objector claim to evade military service and criminal penalty.

He was a member of the Air Force Reserve Officer's Training Corps at the University of California at Los Angeles during the first year of his attendance (1961) (F. 42-43). This fact, admitted by appellant on his conscientious objector form, indicates the absence of any conscientious objection at that time. Yet he claims he has always been opposed to use of force (violence) because of an awareness that he would be acting against his religious convictions (emphasis added) (F. 38, Item 6, page 41). When appellant refused to submit to induction he stated his refusal was based on personal moral convictions (emphasis added) (F. 33). This position was reiterated during the trial in response to the trial court's questions (R. T. 16-17). According to appellant's testimony it appears that his convictions did not become crystallized into religious beliefs until he submitted his conscientious objector claim, after his refusal to submit (R. T. 10-11) (emphasis added). Thus a basis in fact appears in the evidence submitted by appellant that he was not sincere in claiming previously to have held a religious belief which involved duties motivating him conscientiously to object to military service.

Religious training and belief, in the context of conscientious objection entitling a registrant to exemption from military service, excludes essentially political, sociological, or philosophical views or a merely personal moral code. Title 50, Appendix, United States



Code, Section 462.

Appellant claims a belief in a supreme being, a creator of natural law, who may become displeased at violations of natural law (acts of violence, as defined by appellant) and punish the offender (F. 35, Item 2, pages 35-37). Yet he states he received his "training" and acquired the belief which is the basis for his claim by "applying interpretation, organization and reason to everything in life which (he has) perceived" (F. 38, Item 3), and that the individual upon whom he relies most for religious guidance is himself (F. 38, Item 4). Finally, he states he has expressed his views publically, apparently for the first time, in an attorney's office, after his refusal to submit to induction (F. 38, Item 7).

There is sufficient evidence in appellant's claim to form a basis for the inference that appellant's beliefs were actually rationalized, intellectual in their origin, and moral in their fundamental significance. The basis exists for the further inference that the views described were not religious in nature, because they appeared not to occupy in the mind of appellant a place parallel to that filled by God of those admitted qualified for the exemption. The evidence presented therefore supports the conclusion that appellant has described a personal moral code and philosophy, rather than a religious belief.

Taking all of these factors into consideration it is apparent that the local board had a basis in fact for their opinion that the facts presented did not warrant reopening of reclassification. It is submitted therefore, that the action of the board was not a violation



of due process of law.

CONCLUSION

The conviction should be affirmed.

Respectfully submitted,

MANUEL L. REAL,  
United States Attorney,

JOHN K. VAN DE KAMP,  
Assistant U. S. Attorney,  
Chief, Criminal Division,

ROBERT L. BROSIO,  
Assistant U. S. Attorney,  
Assistant Chief, Criminal Division,

WARREN P. REESE,  
Assistant U. S. Attorney,

Attorneys for Appellee,  
United States of America.





CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Robert L. Brosio  
ROBERT L. BROSIO



---

---

IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

---

**No. 20,746**

---

ROBERT ALAN LAWRENCE,  
*Appellant,*

vs.

UNITED STATES OF AMERICA,  
*Appellee.*

---

**PETITION FOR REHEARING**

---

J. B. TIETZ  
410 Douglas Building  
257 South Spring Street  
Los Angeles, California 90012  
*Attorney for Appellant*

FILED

JAN 16 1967

V.M. B. LUCK, CLERK



IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

---

**No. 20,746**

---

ROBERT ALAN LAWRENCE,  
*Appellant,*

vs.

UNITED STATES OF AMERICA,  
*Appellee.*

---

**PETITION FOR REHEARING**

Comes now the appellant, by his attorney, and files this his Petition for Rehearing of Judgment entered by the Court on December 16, 1966, affirming the judgment of the court below.

Appellant reserves his argued position as to each of the points of appeal, but in this petition addresses himself solely to certain features of the decision wherein he believes the Court may be convinced its opinion is incorrect.

The Court erred in its failure to apply the rationale in *Gearey v. United States*, 2 Cir., 1966, ..... F. 2d .....

Although the opinion correctly points out that appellant did not originally claim to be a conscientious objector it makes an incorrect mention of the salient fact in his case, namely, that his views crystallized after the so-called deadline (32 C.F.R. § 1625.2) and he therefore was deprived by the local board of the special appellate procedures. The local board refused to reopen his classification and thus he had no appeal at all.

The opinion states "When his religious ideas might have crystallized is a matter of doubt and pure speculation. He was denied nothing to which he was entitled."

That is incorrect.

**A. With respect to the time of crystallization.**

The Court, we respectfully urge, has overlooked the following in the record: (1) that he first mentioned to the local board that he was a conscientious objector after he was sent the Order to Report for Induction [Ex. 11, 34] and (2) his testimony was unequivocal and undisputed in any manner (Rep. Tr. 16).

These two facts made his case an on-all-fours equivalent of Gearey's.

**B. With respect to the denial of something "to which he was entitled."**

Gearey holds that it is the intent of Congress that registrants professing conscientious objection be given the Special Appellate Procedure and that this intent is not to be thwarted by a local board turning down a late claim in such a way that no appeal is possible.



Another late decision points up this denial of due process, *U. S. A. v. Burlich*, S.D.N.Y., 1966, 257 F. Supp. 906. The court in *Burlich* summarized that "the registrant and the local board were not on the same wave length" [909] and that the court was going to decide the following question in *Burlich's* favor (as a denial of due process). . . "the Board's refusal to reopen his classification with the consequent foreclosure of an appeal from the denial of the requested classification amounted to a deprivation of due process." [909].

Wherefore, upon the foregoing ground, and for other reasons, appearing in appellant's Brief, it is respectfully urged that a rehearing be granted in this matter, and that the mandate of this Court be stayed pending the disposition of this petition.

Counsel represents and certifies: In counsel's judgment this Petition is well founded and is not interposed for delay.

Respectfully,

J. B. TIETZ  
410 Douglas Building  
257 South Spring Street  
Los Angeles, California 90012  
*Attorney for Appellant*

January 11, 1967



NOS. 20336, ✓

20753. ✓

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FRANCISCO J. VEGA-HERNANDEZ,  
FRANK RIVAS, JR.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

**FILED**

JUN 13 1967

WM. B. LUCK, CLERK

EDWIN L. MILLER, JR.,  
United States Attorney,

PHILLIP W. JOHNSON,  
Assistant U. S. Attorney,

325 West "F" Street,  
San Diego, California 92101

Attorneys for Appellee,  
United States of America.

JUN 19 1967



NOS. 20336,

20753.

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FRANCISCO J. VEGA-HERNANDEZ,  
FRANK RIVAS, JR.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR.,  
United States Attorney,

PHILLIP W. JOHNSON,  
Assistant U. S. Attorney,

325 West "F" Street,  
San Diego, California 92101

Attorneys for Appellee,  
United States of America.





## TOPICAL INDEX

	<u>Page</u>
Table of Authorities	ii
I JURISDICTIONAL STATEMENT	i
II STATEMENT OF THE CASE	2
III ERROR SPECIFIED	3
IV STATEMENT OF THE FACTS	3
V ARGUMENT	7
A. ADMISSION OF EVIDENCE REGARDING THE ARIZONA OFFENSE DID NOT CONSTITUTE ERROR.	7
B. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTION OF APPELLANT VEGA.	10
VI CONCLUSION	12
CERTIFICATE	13



TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Diaz-Rosendo v. United States, 357 F.2d 124, 129 (9th Cir. 1966)	10
Enriquez v. United States, 188 F.2d 313, 314-15 (9th Cir. 1951)	9
Galvan v. United States, 318 F.2d 711 (9th Cir. 1963)	11
Ketchum v. United States, 259 F.2d 434 (5th Cir. 1958), cert. denied, 359 U.S. 917 (1959)	11
Klepper v. United States, 331 F.2d 694, 698-99 (9th Cir. 1964)	9
Medrano v. United States, 285 F.2d 23, 24-25 (9th Cir. 1960), cert. denied, 366 U.S. 968 (1961)	9
Mosco v. United States, 301 F.2d 180, 181 (9th Cir. 1962)	10
Ramirez v. United States, 294 F.2d 277, 283 (9th Cir. 1961)	8
Stein v. United States, 337 F.2d 14, 16 (9th Cir. 1964)	10
Teasley v. United States, 292 F.2d 460, 465 (9th Cir. 1961)	9
Vaccaro v. United States, 296 F.2d 500 (5th Cir. 1961)	11
Wright v. United States 192 F.2d 595, 596 (9th Cir. 1951)	9
Yeargain v. United States, 314 F.2d 881, 882 (9th Cir. 1963)	10 (n.3)



IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FRANCISCO J. VEGA-HERNANDEZ,  
FRANK RIVAS, JR.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellants to be guilty as charged in a one-count indictment following a jury trial.

The offense occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 2 and 3231, and Title 21, United States Code, Section 174. Jurisdiction of this Court rests pursuant to Title 28, United States Code,





Sections 1291 and 1294, although there is some question regarding jurisdiction in the case of appellant Vega-Hernandez.

## II

### STATEMENT OF THE CASE

The one-count indictment charged that appellant Francisco Javier Vega-Hernandez (hereinafter referred to as "Vega"), in San Diego County, knowingly concealed, and facilitated the transportation and concealment of, approximately two grams of heroin, a narcotic drug, which, as he then and there well knew, had been imported and brought into the United States contrary to law, and that appellant Frank Rivas, Jr., knowingly aided, abetted, <sup>1/</sup>counseled, induced, and procured the commission of that offense [C.T. 2].

Jury trial of appellants commenced on March 4, 1965, before United States District Judge Fred Kunzel [R.T. 3, 5]. <sup>2/</sup> Appellants were found guilty as charged on March 5, 1965 [C.T. 3-4].

Thereafter, on April 5, 1965, appellant Vega was committed to the custody of the Attorney General for five years, and appellant Rivas was committed to the custody of the Attorney General for ten years with a recommendation that the sentence run concurrently to any state institutional sentence that might be imposed [C.T. 5-6].

---

<sup>1/</sup>

"C.T." refers to the Clerk's Transcript.

<sup>2/</sup>

"R.T." refers to the Reporter's Transcript.



Each appellant filed notice of appeal [C.T. 7-8] .

### III

#### ERROR SPECIFIED

Appellant Vega lists the following points upon appeal:

1. Alleged error in the admission of evidence regarding another offense.
2. Alleged insufficiency of the evidence.

Appellant Rivas lists only one point upon appeal, contending that he was denied a fair trial by the admission of the evidence regarding another offense.

### IV

#### STATEMENT OF THE FACTS

On November 23, 1964, in the Phoenix-Glendale area of Arizona, Lorenzo Zuniga told Lee Russell that he had a fellow from San Diego from whom he was getting his stuff and that the man was there and had "quite a bit of stuff" with him. Zuniga suggested that Russell might want to buy some. The man described by Zuniga was appellant Rivas. The "stuff" was heroin [R.T. 34-39].

Zuniga was known to law enforcement officers as a heroin addict and "small time peddler." He took Russell to meet Rivas in order to obtain a sample. The meeting took place in Glendale on the same date. [R.T. 11-12, 37, 88].

The following conversation occurred:



Rivas: "How much stuff do you want to buy?"

Russell: "I don't know. How much do you have?"

Rivas: "Well, I don't have but a few spoons here with me."

Russell: "What do you mean 'a few spoons'?"

Rivas: "Well, I got about six or seven spoons left."

Russell: "How is the stuff?"

Rivas: "It is pretty good stuff. It is recent stuff."

Russell: "Uncut stuff down here in Phoenix?"

Rivas: "Yes. It is real good stuff."

Zuniga: "Yes, it is." (R.T. 41-42)

Rivas told Russell that if he wanted to buy a big amount, he, Rivas, would bring it. He said that the price of the heroin would be \$600 per ounce if he brought it to Phoenix and \$500 per ounce in San Diego, [R.T. 13, 44] .

Rivas agreed to sell one of the spoons to Russell, who said that he had to go and get some more money. Rivas told Russell to get the money and come back and that he would have the heroin for Russell [R.T. 15] .

Russell then left and met with Federal narcotics agents Richard J. Yelvington and Frank Sojac. He reported that Zuniga's man had offered to make a sale. Yelvington said, "Let's try about a hundred dollars' worth and see if his stuff is heroin." Russell received \$100 and went back to Rivas, who refused to make a sale but said that he would sell to Zuniga. Russell then went to get Zuniga and returned to Rivas, who made a sale to Zuniga, who paid the money furnished by Russell [R.T. 15-16, 71, 88-89] .





Rivas handed a package to Zuniga, who delivered the package to Russell. Agent Yelvington observed the transaction by peering through a hole in a storage building [R.T. 19-20, 72-74].

Chemist Edward M. Eastland testified concerning his expert qualifications and testified that the package in question contained heroin [R.T. 135-38]. There also was testimony regarding the "chain of possession" of the exhibit [R.T. 16-18, 20, 54-55, 75-78, 137-39, 142-43, 152].

Appellant Rivas called Russell on the telephone later on the same day. He asked Russell if he wanted to make a bigger purchase. Russell replied in the affirmative and offered to go to San Diego as the price would be \$100 cheaper per ounce. They agreed to meet in San Diego on the following day [R.T. 20-21].

Appellant Vega did not object to testimony concerning the events occurring in Arizona [R.T. 12]. The evidence was not received as to Vega, and the heroin exhibit was offered in evidence only in the case of Rivas and not received in evidence in Vega's case [R.T. 159, 198].

Agent Yelvington and Russell left Phoenix for San Diego by automobile and arrived in San Diego at about 3:30 a.m. on November 24. They rented two rooms in the Bayview Travelodge. Rivas called Russell by telephone at about noon and asked him whether he had brought the money. Russell said that he brought \$1450. Rivas said that he would come over as soon as he could [R.T. 22, 78-79].

Appellants Rivas and Vega arrived at the side of the Bayview Travelodge



at approximately 1:55 p.m. Both of them left the vehicle in which they had arrived. Rivas went up the stairs to Room 15 of the Travelodge. Vega remained in the area of the parking lot and stood there for approximately 10 minutes, looking toward the windows of Room 15 once in a while. Russell was in Room 15, and Agent Yelvington had also rented Room 16, which was the adjoining room [R.T. 109-10]. There was a hidden radio transmitter in Room 15, and a radio receiver for the same frequency was in Room 16. Agent Yelvington had searched Russell and Room 15 during the morning and had found no narcotics [R.T. 65, 80-81].

Rivas knocked on the door of Russell's room, entered, and engaged in some conversation. After he asked Russell whether he had the money, Russell showed the \$1450, and Rivas went to the door and whistled to appellant Vega. Vega came up the stairs, entered, and handed some powder to Rivas. Rivas dumped it out on a table, and Russell said that it looked good. They discussed the fact that the powder was a sample and the question whether Russell should pay in advance for the remaining three ounces [R.T. 23-25].

Agent Yelvington was listening to the conversation in the next room, using the radio receiver. When Agent Yelvington heard Rivas offer to take \$600 in advance and leave Vega as security for the delivery of the "stuff" (meaning a narcotic), he called Russell on the telephone, told him to say that it was the manager calling, and told him not to pay any money in advance [R.T. 25, 81, 83, 85].

Russell agreed to go with Rivas, who poured the powder into a cellophane package and handed it to Vega. The three of them went downstairs and



and entered a vehicle and left. Rivas was driving with Vega in front on the passenger side. Russell was in the rear, seated behind Rivas, the driver [R.T. 25-26, 158].

Before the vehicle had traveled one-half of a block, another vehicle driven by Federal Bureau of Narcotics Officer Joe Baca drove alongside. Two officers with Baca identified themselves to Rivas, Vega, and Russell and told them to pull over. Rivas accelerated his vehicle. Rivas said something to Vega, and Vega threw an object over his right shoulder and out of the window. Rivas then stopped the vehicle after a shot was fired at a rear tire [R.T. 26, 108, 112, 134].

A cellophane container with powder was found on the ground, about 10 feet from the right rear fender of the vehicle operated by Rivas. It was just to the right of the path taken by the vehicle [R.T. 112].

Chemist Eastland testified that the powder in the container included heroin with some similarity to the heroin in the Arizona exhibit. There was testimony concerning the "chain of possession" of the exhibit [R.T. 112-14, 119-23, 139-43].

Appellants did not testify [R.T. 162] .

## V

### ARGUMENT

A. ADMISSION OF EVIDENCE REGARDING THE ARIZONA OFFENSE DID NOT CONSTITUTE ERROR.

Appellant Vega has no standing to complain of the admission of





evidence of the activities occurring in Arizona , since the evidence was not received against him and since he made no objection when the evidence was offered [R.T. 12] .

An objection is waived by failure to make timely objection in the Trial Court.

Ramirez v. United States, 294 F.2d 277 , 283 (9th Cir. 1961) .

The Trial Court very specifically informed the jury that none of the events "or anything that occurred in Arizona , is to be considered as against the defendant Vega. He was not there. He had no connection with it, nor can you charge him with any knowledge of it merely because of his association with the defendant Rivas." [R.T. 198] .

Counsel for appellant Vega considered the Arizona testimony to be so unimportant to his client that he told the jury that "I am not even going into that because it has nothing whatsoever to do with the defendant Vega." [R.T. 174] .

In view of the failure to make timely objection, the strong language in the instruction to the jury, and the relative insignificance of the Arizona evidence in Vega's case , it is respectfully submitted that his defense was not prejudiced by the admission of this evidence which was not even received in his case [R.T. 159, 198].

In regard to appellant Rivas , the evidence of his sale of heroin in Arizona , on the date previous to the date of the alleged offense in San Diego County , was admissible against him to show intent and also to prove the



crime charged.

This Court has frequently upheld the admission of evidence of crimes similar to the crime charged.

Enriquez v. United States, 188 F.2d 313, 314-15 (9th Cir. 1951);

Wright v. United States, 192 F.2d 595, 596 (9th Cir. 1951);

Medrano v. United States, 285 F.2d 23, 24-25 (9th Cir. 1960), cert.

denied, 366 U. S. 968 (1961);

Klepper v. United States, 331 F.2d 694, 698-99 (9th Cir. 1964);

Teasley v. United States, 292 F.2d 460, 465 (9th Cir. 1961).

The instant appeal is far more favorable to appellee than the cited cases, particularly in view of the fact that the previous offense occurred on the previous day, as compared to approximately three years in Enriquez, one year in Klepper, about 10 months in Medrano, and at least four days in Wright. In Teasley, the two crimes involved differing substances (marihuana and heroin).

Furthermore, the Arizona evidence was admissible because the transaction was directly related to the crime charged in the indictment and was necessary in order to provide a complete picture of the transaction charged in the indictment. The Arizona sale and the San Diego sale involved the same real purchaser and same vendor and were part of the same transaction, since the Arizona heroin was a sample [R.T. 37] for the San Diego sale. The close connection between the Arizona transaction and the San Diego transaction is highlighted in the brief of appellant Vega, who also claims that the evidence



was inadmissible: "The whole enterprise in San Diego was the outgrowth of Russell's coming to Agent Yelvington's office in Phoenix . . . ." (Vega Brief, p. 3). Consequently, it is respectfully submitted that the evidence would have been admissible against appellant Rivas, even in the absence of the Trial Court's instruction to the jury, strictly limiting the effect of the evidence [R.T. 198-99] .

B. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTION OF APPELLANT VEGA.

Appellant Vega contends that the evidence was insufficient to sustain his conviction. However, the appellate court views the evidence in the most favorable light to sustain the judgment below.

Stein v. United States, 337 F.2d 14, 16 (9th Cir. 1964);

Mosco v. United States, 301 F.2d 180, 181 (9th Cir. 1962).

Aiding and abetting may be proved by circumstantial evidence.

Diaz-Rosendo v. United States, 357 F.2d 124, 129 (9th Cir. 1966).

Considering the rule that an appellate court views all inferences to be drawn from the evidence in the light most favorable to the government,<sup>3/</sup> it is evident that the powder possessed by Vega and Rivas at the Travelodge was heroin and was inside of the object thrown out of the window of the vehicle by Vega [R.T. 24-26, 112-13, 126, 141] .

---

3/

Yeargain v. United States, 314 F.2d 881, 882 (9th Cir. 1963).





Russell testified concerning these events [R.T. 24-26], and his testimony was corroborated by the testimony of Agent Yelvington, who heard major portions of a conversation involving Russell and two other men, one of whom entered the room and was introduced after a whistle [R.T. 82-83]. Additional corroboration was provided by the testimony of Agent Baca, who watched as Rivas went to Room 15 and as Rivas, Vega, and Russell later left Room 15 together. Agent Baca testified that no one else had entered the room during the relevant period, so it is clear that Vega was one of the three men participating in the conversation overheard by Agent Yelvington [R.T. 110-11].

The heroin was found about 10 feet from the vehicle, after approximately 5 minutes of search [R.T. 126]. Although appellant Vega suggests that there is insufficient evidence to connect the heroin found upon the ground with the powder mentioned in Russell's testimony, the connecting evidence compares favorably to the evidence which was considered to be sufficient in the cases of Galvan v. United States, 318 F.2d 711 (9th Cir. 1963); Vaccaro v. United States, 296 F.2d 500 (5th Cir. 1961); and Ketchum v. United States, 259 F.2d 434 (5th Cir. 1958), cert. denied, 359 U.S. 917 (1959).



VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

EDWIN L. MILLER, JR.,  
United States Attorney

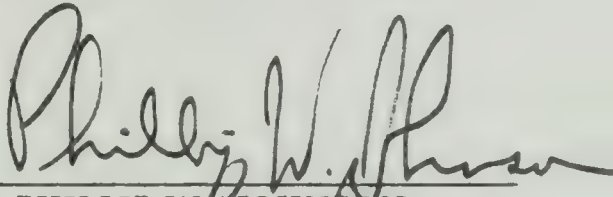
PHILLIP W. JOHNSON  
Assistant U. S. Attorney

Attorneys for Appellee,  
United States of America.



CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

---

PHILLIP W. JOHNSON





N O. 2 0 7 5 4 ✓

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

DONALD WRAY SPEARS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

---

**FILED**

OCT 3 1966

WM. B. LUCK, CLERK

EDWIN L. MILLER, JR.,  
United States Attorney,  
PHILLIP W. JOHNSON,  
Assistant U. S. Attorney,

325 West "F" Street  
San Diego, California 92101

Attorneys for Appellee,  
United States of America.



N O. 2 0 7 5 4

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD WRAY SPEARS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

---

EDWIN L. MILLER, JR.,  
United States Attorney,  
PHILLIP W. JOHNSON,  
Assistant U. S. Attorney,

325 West "F" Street  
San Diego, California 92101

Attorneys for Appellee,  
United States of America.



## TOPICAL INDEX

	<u>Page</u>
Table of Authorities	ii
I JURISDICTIONAL STATEMENT	1
II STATEMENT OF THE CASE	2
III ERROR SPECIFIED	3
IV STATEMENT OF THE FACTS	3
V ARGUMENT	7
A. THE EVIDENCE IN QUESTION WAS LAWFULLY SEIZED.	7
B. THE SEARCH WAS A PROPER SEARCH INCIDENT TO A LAWFUL ARREST.	10
C. THE MOTION TO SUPPRESS EVIDENCE WAS PROPERLY DENIED AS UNTIMELY.	10
D. THE DECISION IN <u>MIRANDA VS.</u> <u>ARIZONA</u> IS NOT RETROACTIVE.	11
E. WHETHER OR NOT APPELLANT WAS ADVISED OF HIS CONSTITUTIONAL RIGHTS CANNOT AFFECT THE LEGALITY OF THE SEARCH.	11
VI CONCLUSION	12
CERTIFICATE	13





## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Bible v. United States, 314 F. 2d 106 (9th Cir. 1963)	8
Blackford v. United States, 247 F. 2d 745 (9th Cir. 1957)	7, 8
Denton v. United States, 310 F. 2d 129 (9th Cir. 1962)	7, 8
Erwing v. United States, 296 F. 2d 320 (9th Cir. 1961)	4
Johnson v. New Jersey, 384 U.S. 719 (1966)	11
King v. United States, 348 F. 2d 814 (9th Cir. 1965)	9
Landau v. United States Attorney for Southern Dist. , 82 F. 2d 285 (2nd Cir. 1936), cert. den. 298 U.S. 665 (1936)	8
Miranda v. Arizona, 384 U.S. 436 (1966)	11
Morgan v. United States, 340 F. 2d 125 (9th Cir. 1965)	8
Murgia v. United States, 285 F. 2d 14 (9th Cir. 1960)	7
Moises Rivas v. United States, 9th Cir. No. 20556	8
Sandez v. United States, 239 F. 2d 239 (9th Cir. 1956)	11
Segurola v. United States, 275 U.S. 106 (1927)	11
United States v. Paradise, 334 F. 2d 748 (3rd Cir. 1964)	11
Witt v. United States, 287 F. 2d 389 (9th Cir. 1961), cert. den. 366 U.S. 950 (1961)	8



<u>Statutes</u>	<u>Page</u>
Title 18, United States Code, §1407	1, 2, 4
Title 18, United States Code, §3231	1
Title 21, United States Code, §173	2
Title 21, United States Code, §174	1
Title 28, United States Code, §1291	2
Title 28, United States Code, §1294	2

### Rules

#### Federal Rules of Criminal Procedure:

Rule 41(e)	10
------------	----



IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD WRAY SPEARS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in all counts of a three-count indictment, following trial by jury [C. T. 25]. <sup>1/</sup>

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 1407 and 3231, and Title 21, United States Code, Section 174. Jurisdiction of this Court rests pursuant to

---

<sup>1/</sup> "C. T. " refers to the Clerk's Transcript.





II

STATEMENT OF THE CASE

Appellant was charged in each count of a three-count indictment returned by the Federal Grand Jury for the Southern District of California, Southern Division. The first count alleged that appellant knowingly imported and brought approximately one ounce of heroin, a narcotic drug, into the United States from Mexico, contrary to Title 21, United States Code, Section 173 [C. T. 2].

The second count alleged that appellant knowingly concealed, and facilitated the transportation and concealment of, approximately one ounce of heroin, a narcotic drug, which, as he then and there well knew, had been imported and brought into the United States contrary to law [C. T. 3].

The third count alleged that appellant returned to and entered the United States without registering as required under Title 18, United States Code, Section 1407, being a citizen of the United States who was addicted to narcotic drugs, a user of narcotic drugs, and a person who was convicted of possession of narcotics in 1957 [C. T. 3].

Jury trial of appellant commenced on July 20, 1965, before United States District Judge James M. Carter [C. T. 23]. Appellant was found guilty as charged on each count on July 21, 1965 [C. T. 24-25].



Thereafter, on August 23, 1965, appellant was committed to the custody of the Attorney General for five years upon Count One, five years upon Count Two (to run concurrently) and two years upon Count Three (to run concurrently). There was a recommendation for hospital treatment for narcotics addiction [C. T. 27].

Appellant subsequently filed a notice of appeal [C. T. 29].

### III

#### ERROR SPECIFIED

Appellant has specified only one point upon this appeal:

"That the heroin found in exhibit 2 has been improperly procured from defendant in violation of his right against unreasonable search and seizure under the Fourth Amendment to the Constitution and in violation of due process of law under the Fifth Amendment to the Constitution." (Appellant's Opening Brief, p. 2).

### IV

#### STATEMENT OF THE FACTS

On March 19, 1965, appellant entered the San Ysidro area of California from Mexico in an automobile [R. T. 4-6, 12]. <sup>2/</sup> He

---

<sup>2/</sup> "R. T." refers to the Reporter's Transcript of Proceedings.



talked to United States Customs Inspector Herbert Reay, Jr., but declared no merchandise [R. T. 4-5]. Appellant at that time was addicted to the use of heroin and was an American citizen [R. T. 5, 54-55], but he did not register under Title 18, United States Code, Section 1407 [R. T. 9]. He told Inspector Reay that he was from Oakland [R. T. 5].

Inspector Reay observed appellant as the latter removed from his pocket a piece of paper resembling a narcotics or heroin bindle [R. T. 6-7]. Appellant stated that he did not know what was in the paper [R. T. 7]. A test was used upon the bindle without reaching any resulting determination that it contained heroin or a derivative of opium [R. T. 9].

Inspector Reay, who had had 13 years of law enforcement experience at the border, noted that appellant had needle marks similar to those generally found upon narcotics addicts or users [R. T. 8]. He then decided to conduct a body search, involving the removal of all clothing. During this inspection he observed grease around appellant's rectal area [R. T. 7, 11].

Customs Agent Arnie Lohman advised appellant of his Constitutional rights and questioned him. Appellant stated that he had purchased the bindle in Tijuana and that it was supposed to contain cocaine <sup>3/</sup> [R. T. 22, 24].

---

<sup>3/</sup> Cocaine is a narcotic drug.





Agent Lohman observed that appellant had fresh needle marks and scar tissue over the veins and that the pupils of his eyes did not react normally. Furthermore, the fact that appellant had grease in his rectal area indicated to Agent Lohman (who had been a Customs agent for 37 years) that narcotics were concealed in a body cavity [R. T. 22-23].

Customs officers transported appellant to the office of Dr. Paul R. Salerno, who examined appellant and declared that appellant was a narcotic user and under the influence of narcotics at that time [R. T. 25, 29]. Agent Lohman then arrested appellant for failing to register as a narcotic user [R. T. 25].

Appellant objected to a rectal examination but submitted under protest after he was informed that the examination would be conducted whether he agreed or disagreed. He kicked his feet during the examination and was restrained by officers [R. T. 25, 27]. Dr. Salerno removed a rubber-enclosed packet from appellant's rectal cavity and gave it to Agent Lohman [R. T. 33].

United States Customs Chemist George Hill later analyzed the contents of the packet. He testified concerning his expert qualifications and also testified that the packet contained about 25 grams of heroin [R. T. 18-21]. Other witnesses testified concerning the possession of the packet and bindle between the time that they were obtained from appellant and the time of Mr. Hill's analysis of each [R. T. 14-15, 23, 26, 33].

Dr. Salerno testified concerning his academic and medical background [R. T. 29-30]. He also testified that he observed five



relatively recent needle marks upon one of appellant's arms, that appellant was then under the influence of a narcotic drug as well as another drug, and that the exhibit in question was removed from appellant's rectum in an approved medical manner, involving use of a sanitary glove [R. T. 31-35].

He testified that the removal of the object would not be very different from a normal bowel movement in terms of physical discomfort, that appellant exhibited no exclamation or evidence of pain, and that the original insertion of the packet would be more painful than the removal [R. T. 34].

After the packet was removed from his rectal cavity, appellant was again advised of his Constitutional rights and stated: "You might as well throw that bindle away. That is only sugar of milk. I brought it along to test narcotics in Mexico." [R. T. 26.] The bindle that had been removed from appellant's pocket at the border did contain milk sugar [R. T. 19].

At the time of the offense appellant was on parole relating to charges of possession and use of drugs [R. T. 53].

The trial Court denied appellant's motion to suppress evidence as untimely [R. T. 42-43]. The Court also announced findings of fact upon the question [R. T. 42, 61-64, 118]. The Court held that the search at Dr. Salerno's office was an extension of a border search, that no physicians of repute were known to reside at San Ysidro, that the search also was incident to a lawful arrest, that the search was reasonable and did not shock the conscience or offend the sense of justice, and that appellant suffered no pain



[R. T. 62-64].

The jurors also answered interrogatories relating to the validity of the search. They were instructed that the answers to the interrogatories must be unanimous [R. T. 104].

The jury held that the digital examination and procedures employed by Dr. Salerno were "performed in the proper and customary approved medical manner". The jurors also held that no pain or suffering was involved. Furthermore, they held that the search of appellant's rectal cavity was not "shocking to the conscience or offensive to a sense of justice" [C. T. 26]. Each of these conclusions was unanimous [R. T. 115].

## V

### ARGUMENT

#### A. THE EVIDENCE IN QUESTION WAS LAWFULLY SEIZED.

---

Appellant asserts that the search of his rectum was unreasonable. Searches of this nature have been repeatedly upheld by this Court.

Blackford v. United States, 247 F.2d 745

(9th Cir. 1957);

Murgia v. United States, 285 F.2d 14

(9th Cir. 1960);

Denton v. United States, 310 F.2d 129

(9th Cir. 1962);





Morgan v. United States, 340 F.2d 125

(9th Cir. 1965). 4/

Appellant asks this Court to overrule its decision in Blackford, supra, but he does not cite a single decision supporting his position.

Appellant contends that probable cause should have been determined by a magistrate. However, the search in question was a border search (Denton, supra, at p. 133), and a border search does not require probable cause to arrest or search.

Witt v. United States, 287 F.2d 389, 391

(9th Cir. 1961), cert. denied,

366 U.S. 950 (1961);

Bible v. United States, 314 F.2d 106, 108

(9th Cir. 1963).

A border search does not require a warrant.

Denton, supra, at p. 132;

Landau v. United States Attorney for Southern Dist.,

82 F.2d 285, 286 (2nd Cir. 1936), cert.

denied, 298 U.S. 665 (1936).

"Mere suspicion has been held enough cause for a search at the border."

Witt, supra, at p. 391, quoted with approval in

Bible, supra, at p. 108, and in

---

4/ As this brief is being prepared, an appeal involving the same issue is pending before this Court in Moises Rivas v. United States, No. 20556.



A determination by a magistrate would depend upon probable cause, but the law does not require probable cause. "Mere suspicion" is sufficient. In the instant case there was more than mere suspicion. Appellant was under the influence of narcotics and another drug at the time of the search. He had five relatively recent needle marks upon one arm [R. T. 31-35]. He had grease in his rectal area, which indicated to Agent Lohman (who had been a Customs agent for 37 years) that narcotics were concealed in a body cavity [R. T. 22-23]. His eyes did not react normally, and he admitted having just attempted to purchase cocaine (a narcotic drug) in Tijuana [R. T. 22-24].

Although the law does not provide for such a procedure, appellant had the benefit of a jury decision as well as a decision by the trial judge upon the question of validity of the search. The jurors held that the digital examination and procedures used by Dr. Salerno were "performed in the proper and customary approved medical manner" [C. T. 26]. They found that the defendant did not endure any pain or suffering during the doctor's examination [C. T. 26]. The jury also held that the search of appellant's rectal cavity was not "shocking to the conscience or offensive to a sense of justice" [C. T. 26]. The trial Judge also held that the search was reasonable [R. T. 62-64].



B. THE SEARCH WAS A PROPER SEARCH  
INCIDENT TO A LAWFUL ARREST.

---

The jury found that the search of appellant's rectal cavity was preceded by the arrest of appellant [C. T. 26]. Furthermore, the trial Court held that the search was incident to a lawful arrest [R. T. 63]. Consequently, the search not only was a proper border search but also was a proper search incident to a lawful arrest. There is an important public interest in the search of prisoners to prevent the dissemination of narcotics in the jails and prisons.

C. THE MOTION TO SUPPRESS EVIDENCE WAS PROPERLY DENIED  
AS UNTIMELY.

---

The motion to suppress evidence herein was denied as untimely [R. T. 42-43]. It is evident from the record that appellant failed to comply with Rule 41(e) of the Federal Rules of Criminal Procedure, which provides in pertinent part as follows:

"The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

In absence of extenuating circumstances, a motion to suppress evidence is waived if not made in a timely fashion.





Sandez v. United States, 239 F.2d 239, 242

(9th Cir. 1956);

Segurola v. United States, 275 U.S. 106, 112 (1927).

The fact that evidence is taken upon a motion to suppress evidence does not prevent a proper decision that the motion will be denied as untimely.

United States v. Paradise, 334 F.2d 748, 749

(3rd Cir. 1964).

D.     THE DECISION IN MIRANDA VS.  
ARIZONA IS NOT RETROACTIVE.

---

The only case cited by appellant in support of his position is Miranda v. Arizona, 384 U.S. 436 (1966). However, the decision in Miranda does not apply to trials commencing prior to June 13, 1966.

Johnson v. New Jersey, 384 U.S. 719, 734 (1966).

The trial herein commenced on July 20, 1965 [C. T. 23], prior to the Miranda decision.

E.     WHETHER OR NOT APPELLANT WAS  
ADVISED OF HIS CONSTITUTIONAL  
RIGHTS CANNOT AFFECT THE LEGAL-  
ITY OF THE SEARCH.

---

Appellant contends that he should have been advised of his privilege against self-incrimination and his right to counsel. He



was given considerable advice in this regard [C. T. 26]. Such a warning would not have affected the right to search appellant's rectum. Had he desired to invoke the privilege against self-incrimination, he would not have prevented the search. Advice by an attorney also would not have prevented the search.

## VI

### CONCLUSION

For the foregoing reasons, it is respectfully submitted that the jury verdict of guilty in the Court below should be affirmed.

Respectfully submitted,

EDWIN L. MILLER, JR.,  
United States Attorney,

PHILLIP W. JOHNSON,  
Assistant U. S. Attorney,

Attorneys for Appellee,  
United States of America.



## CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Phillip W. Johnson  
PHILLIP W. JOHNSON





UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JORD O. HALE,

Petitioner and Appellant.

vs.

LAWRENCE E. WILSON, Warden  
San Quentin State Prison,  
Tamal, California,

Respondent and Appellee.

No. 20755 ✓

APPELLEE'S BRIEF

THOMAS C. LYNCH, Attorney General  
of the State of California

ROBERT R. GRANUCCI  
Deputy Attorney General

MICHAEL R. MARRON  
Deputy Attorney General

6000 State Building  
San Francisco, California 94102  
Telephone: 557-0311

Attorneys for Respondent-Appellee

FILED

APR 26 1966

WM. B. LUCK, CLERK



## TOPICAL INDEX

	<u>Page</u>
JURISDICTION	1
STATEMENT OF THE CASE	2
SUMMARY OF APPELLEE'S ARGUMENT	4
ARGUMENT	
I.    APPELLANT'S PLEA OF GUILTY FORE- CLOSES COLLATERAL ATTACK UPON HIS CONVICTION ON THE GROUND THAT IT WAS IMPELLED BY ILLEGALLY OBTAINED EVIDENCE.	4
II.   THE RULE OF <u>ESCOBEDO</u> SHOULD NOT BE APPLIED RETROACTIVELY.	7
III.  APPELLANT'S CONTENTION THAT HIS PLEA OF GUILTY WAS OBTAINED BY REASON OF HIS ATTORNEY'S DERE- LICTION OF DUTY IS NOT SUPPORTED BY HIS ALLEGATIONS.	8
CONCLUSION	9



## TABLE OF CASES

	<u>Page</u>
<u>Carrizosa v. Wilson,</u> 244 F.Supp. 120 (N.D.Cal. 1965)	3, 7
<u>Davis v. United States,</u> 347 F.2d 374 (9th Cir. 1965)	5
<u>Escobedo v. Illinois,</u> 378 U.S. 478 (1964)	3, 4 n., 7
<u>Harris v. United States,</u> 338 F.2d 75 (9th Cir. 1964)	5, 6
<u>In re Seiterle,</u> 61 Cal.2d 651 (1964)	5
<u>Morse v. United States</u> 295 F.2d 30 (8th Cir. 1961)	6
<u>Sullivan v. United States</u> 315 F.2d 304 (10th Cir. 1963), <u>cert. denied</u> , 375 U.S. 910	6
<u>Townsend v. Burke,</u> 334 U.S. 736 (1948)	5
<u>United States v. Kniess,</u> 264 F.2d 353 (7th Cir. 1959), <u>cert. denied</u> , 359 U.S. 947	6
<u>United States v. Miller,</u> 293 F.2d 697 (2d Cir. 1961)	6
<u>Waley v. Johnston,</u> 139 F.2d 117 (9th Cir. 1944), <u>cert. denied</u> , 321 U.S. 779 (1944)	6
<u>Wallace v. Heinze,</u> 351 F.2d 39 (9th Cir. 1965)	6
<u>Watts v. United States,</u> 278 F.2d 247 (D.C. Cir. 1960)	6





UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JORD O. HALE,

Petitioner and Appellant,

**VS.**

No. 20755

LAWRENCE E. WILSON, Warden,  
San Quentin State Prison,  
Tamal, California,

Respondent and Appellee.

APPELLEE'S BRIEF

## JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause has been issued.



## STATEMENT OF THE CASE

On November 18, 1960, appellant was convicted in the Superior Court of Merced County, California, on his plea of guilty to charges of kidnaping for the purpose of robbery in violation of section 209 of the California Penal Code and armed robbery in violation of section 211 of the California Penal Code.<sup>1/</sup>

Appellant was sentenced to the state prison for the terms prescribed by law on each count, to be served concurrently, and took no appeal from his conviction (Appendix p. 2; AOB 2; CT 2).<sup>2/</sup>

Subsequently, however, appellant applied to the Superior Court of Marin County for a writ of habeas corpus. This petition was denied on September 15, 1965. A similar habeas corpus petition was denied by the California Supreme Court on November 10, 1965 (CT 5-6).

On December 2, 1965, appellant filed an

---

1. Since an order to show cause was not issued by the District Court, respondent-appellee did not have the opportunity to file a formal return. For the convenience of this Court, a copy of the judgment is included in an appendix to this brief.

2. As used herein, "AOB" refers to appellant's opening brief. "CT" refers to the transcript of record filed in this Court, constituting the United States District Court Clerk's record on appeal.



application for a writ of habeas corpus in the United States District Court for the Northern District of California, Southern Division (CT 1-22). On that same date the District Court filed its order denying the petition on the ground that appellant's conviction rested upon a plea of guilty entered pursuant to consultation with and advice of counsel; that a confession allegedly obtained from appellant in violation of Escobedo v. Illinois, 378 U.S. 478 (1964), was as a consequence not used as evidence against him; and that since under Carrizosa v. Wilson, 244 F.Supp. 120 (N.D.Cal. 1965), Escobedo could not be applied retroactively, there was no basis for concluding that appellant's plea was impelled by an improperly obtained confession (CT 23-24).

Appellant thereafter filed a petition for rehearing on December 14, 1965 (CT 25-29). The District Court denied the petition on December 22, 1965, after noting that appellant had not raised any matters not previously considered by the court's original order denying the petition for writ of habeas corpus (CT 30).

Thereafter, on January 13, 1966, the District Court filed an order granting appellant's application for a certificate of probable cause and granted appellant leave to appeal in forma pauperis (CT 38).





## SUMMARY OF APPELLEE'S ARGUMENT

I. Appellant's plea of guilty forecloses collateral attack upon his conviction on the ground that it was impelled by illegally obtained evidence.

II. The rule of Escobedo should not be applied retroactively.

III. Appellant's contention that his plea of guilty was obtained by reason of his attorney's dereliction of duty is not supported by his allegations.

### I

#### APPELLANT'S PLEA OF GUILTY FORECLOSURES COLLATERAL ATTACK UPON HIS CONVICTION ON THE GROUND THAT IT WAS IMPELLED BY ILLEGALLY OBTAINED EVIDENCE.

Appellant contends that as a result of unlawful police action, he made statements to the prosecutor amounting to a confession of the crimes charged against him (CT 13; AOB 5-6).<sup>3/</sup> As appellant's allegations establish, and as the District Court found, appellant's plea of guilty, which was entered upon the withdrawal of his original plea

---

3. In his petition and papers before the District Court, appellant sought by his allegations to bring his case within the rule of Escobedo v. Illinois, 378 U.S. 478 (1964) (CT 15-17). The District Court dealt with the petition upon this basis. Appellant's opening brief filed in this Court, however, fails to mention Escobedo, and instead he argues that his alleged confession was obtained by coercion and harassment (AOB 7-8).



of not guilty, resulted from the advice of his attorney (CT 15, 19-20; AOB 6-7). Appellant's allegations disclose that when he finally did enter his guilty plea he knew that the district attorney could make no deals or promises to him, he knew that his crime partners had agreed to plead guilty, and he decided to enter a guilty plea himself only after consultation with his attorney in the presence of his wife and brother (CT 14-15; AOB 5, 7).

Appellant's plea of guilty, entered upon advice of counsel, forecloses any consideration of his claims. As the District Court properly recognized, his alleged confession was not used to convict him; his conviction was based upon his plea of guilty. Townsend v. Burke, 334 U.S. 736 (1948); Wallace v. Heinze, 351 F.2d 39 (9th Cir. 1965); Davis v. United States, 347 F.2d 374 (9th Cir. 1965); Harris v. United States, 338 F.2d 75 (9th Cir. 1964); In re Seiterle, 61 Cal.2d 651 (1964). In the Harris case this Court said:

By his plea of guilty appellant foreclosed his right to raise objections to the manner in which evidence upon which he was indicted was obtained. This evidence, because of his guilty plea, was not used against him. Had he stood trial his objection to its introduction, if made and overruled by the trial



court, could have been raised on appeal. Under the circumstances he may not belatedly raise the contention under 28 U.S.C. § 2255. Eberhart v. United States, 9 Cir., 1958, 262 F.2d 421 . . . The conviction and sentence which follow a plea of guilty are based solely and entirely upon said plea and not upon any evidence which may have been improperly acquired by the prosecuting authorities. United States v. French, 7 Cir., 1960, 274 F.2d 297; United States v. Sturm, 7 Cir., 1950, 180 F.2d 413; Kinney v. United States, 10 Cir., 1949, 177 F.2d 895." Harris v. United States, supra at 80.

Even if petitioner's decision to plead guilty was influenced by the allegedly illegally obtained evidence, the federal courts have consistently held that a claim that inadmissible evidence induced a plea of guilty is no basis for setting aside a conviction. Sullivan v. United States, 315 F.2d 304 (10th Cir. 1963), cert. denied, 375 U.S. 910; Morse v. United States, 295 F.2d 30 (8th Cir. 1961); United States v. Miller, 293 F.2d 697 (2d Cir. 1961); Watts v. United States, 278 F.2d 247 (D.C. Cir. 1960); United States v. Kniess, 264 F.2d 353 (7th Cir. 1959), cert. denied, 359 U.S. 947; Waley v. Johnston, 139 F.2d 117 (9th Cir. 1944), cert.





denied, 321 U.S. 779 (1944).

## II

### THE RULE OF ESCOBEDO SHOULD NOT BE APPLIED RETROACTIVELY.

Appellant seeks to upset his conviction by urging a retroactive application of the exclusionary rule of Escobedo v. Illinois, 378 U.S. 478 (1964). Even if his statements had been introduced into evidence, Escobedo would not be applicable. Appellant's conviction became final in 1960, four years before the Escobedo decision. The United States District Court, Northern District of California, Southern Division, has ruled in Carrizosa v. Wilson, 244 F.Supp. 120 (N.D.Cal 1965), that Escobedo is not to be applied retroactively. The District Court below rejected appellant's contention, basing its conclusion on that authority. Carrizosa is before this Court (No. 20304) and the issue of the retroactivity of Escobedo has been extensively briefed therein by the Office of the Attorney General of California. Additional copies of the Carrizosa brief have been filed with this Court for its use in the instant appeal and a copy has been served upon appellant Hale. The argument as presented in the Carrizosa brief is hereby incorporated by reference into this brief, and, we submit, completely disposes of appellant's contention



in this regard. The District Court therefore properly rejected the contention.

### III

APPELLANT'S CONTENTION THAT HIS PLEA OF GUILTY WAS OBTAINED BY REASON OF HIS ATTORNEY'S DERELICTION OF DUTY IS NOT SUPPORTED BY HIS ALLEGATIONS.

Although he did not raise the point in the District Court, appellant here contends that his plea of guilty was due at least in part to ineffective aid of counsel in the preparation and investigation of his case (AOB 9-11). On the contrary, appellant's own allegations disclose that he was represented by counsel during the preliminary examination and that the attorney took an active part in the proceedings (CT 15; AOB 6-7). Within a few days after appellant apparently had been held to answer for trial on the charges, his attorney advised him for the first time that a guilty plea would be in his best interest. Nevertheless, contrary to the advice of his attorney, appellant, together with his crime partners, allegedly entered pleas of not guilty in superior court. However, appellant's allegations disclose that prior to the date set for trial, he again conferred with his attorney, this time in the company of his wife and his brother (CT 15, 19-20). As a result of this discussion, appellant ultimately entered his plea of guilty which formed the basis for his



conviction. The District Court properly found that upon the allegations made by appellant in his petition before that court, the advice of the attorney cannot be said to be defective. Clearly, appellant's allegations do not support his contention here that he was denied effective aid of counsel.

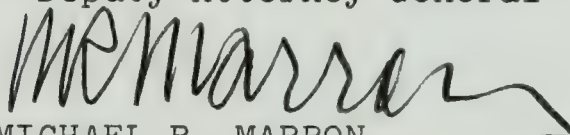
CONCLUSION

For the reasons stated, it is submitted that the order of the District Court denying appellant's petition for writ of habeas corpus should be affirmed.

DATED: APRIL 20, 1966

THOMAS C. LYNCH, Attorney General  
of the State of California

ROBERT R. GRANUCCI  
Deputy Attorney General

  
MICHAEL R. MARRON  
Deputy Attorney General

Attorneys for Appellee.

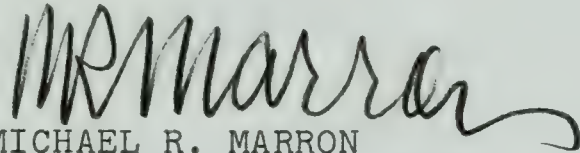




CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

DATED: APRIL 20, 1966

A handwritten signature in dark ink, appearing to read "M. Marron", with a stylized, flowing script.

MICHAEL R. MARRON  
Deputy Attorney General



A P P E N D I X



# In the Superior Court of the State of California

IN AND FOR THE COUNTY OF **MERCED**

## Abstract of Judgment (Commitment to State Prison)

RECEIVED  
CALIF. MEDICAL  
FACILITY  
Nov 22 11 42 AM '60  
JUDICIAL CENTER

The People of the State of California,  
v.s.  
**J. O. HALE,**  
Plaintiff  
Defendant

Present:  
Hon. **R. R. SISCH**  
Judge of the Superior Court  
**STEPHEN P. GALVIN**  
Prosecuting Attorney  
**DONALD R. FRETZ,**  
Counsel for defendant

This certifies that on **Nov. 18**, 19 **60**, judgment of conviction of the above named defendant was entered as follows:

(1) Case No. **5089** Count No. **I and II**  
On his plea of **"Guilty"**

he was convicted by **the Court** of **a felony**, to wit: **Kidnapping for Purposes of Robbery, in violation of Sec. 209 of the Calif. Penal Code; and Robbery, a felony, (First Degree) in violation of § Sec. 211 of the Calif. Penal Code.**  
*With this felony conviction of § 211 and § 209*  
*State County and State* *Crime* *Billpost*

Defendant **was** armed with a deadly weapon at the time of his commission of the offense or a concealed deadly weapon at the time of his arrest within the meaning of Penal Code Section 3024.

R.P. Powers  
Hale  
Hale

THIS INSTRUMENT IS A  
TRUE COPY OF THE ORIGINAL  
ON FILE IN THIS OFFICE  
R. P. Powers

\*Insert: guilty, not guilty, former conviction or acquittal, or be in jeopardy, not guilty by reason of insanity.  
†Insert: denomination of crime and degree if any, including fact that it constitutes a second or subsequent, if that affects the sentence.  
‡Insert: reference to code or statute, including section and subsection thereof, if any violated.  
§ Insert: name of the State Prison, (Pen. C. Sec. 12115, 12116)





(2) Defendant **was not** <sup>(WEISS WAS TRUE)</sup> admitted an habitual criminal within the meaning of Subdivision **a or b** <sup>(a) or (b)</sup> of Section 11101 of the Penal Code and the defendant **is not** <sup>(IS OR IS NOT)</sup> an habitual criminal within the meaning of that section.

(3) **It is Therefore Ordered, Adjudged, and Decreed** that the said defendant be punished by imprisonment in the State of California for the term provided by law and that he be committed to the Sheriff of the County of **Merced** and to the Director of Corrections of the State of California at **the Reception & Guidance Center, Vacaville, Calif.,**

**It is ordered** that sentences shall be served **concurrently and not consecutively.**

and **in respect to any prior uncompleted sentence/** as follows:

(4) **To the Sheriff** of the County of **Merced** and to the Director of Corrections at **the Reception & Guidance Center, Vacaville, Calif.,**

Pursuant to the aforesaid judgment this is to command you, the said Sheriff, to deliver the above named defendant into the custody of the Director of Corrections at the **Reception & Guidance Center, Vacaville, Calif.,** at your earliest convenience.

**Witness** my hand and seal of said Court this **18** day of **Nov.** 19**69**

**E. T. JOHNSON** Clerk

By **Ruth Norman** **RUTH NORMAN** Deputy



STATE OF CALIFORNIA

County of MERCED

} ss.

I do hereby certify the foregoing to be a true and correct abstract of the judgment duly made and entered on the minutes of the Superior Court in the above entitled action as provided by Penal Code Section 1213.

Attest my hand and seal of the said Superior Court this 18 day of  
Nov. 19 60

E. T. JOHNSON

County Clerk and ex-officio clerk of the Superior Court of  
the State of California

in and for the County of Merced

BY: Ruth Norman, Deputy

*Ruth Norman*  
Judge of the Superior Court of the State of California in

R. R. SISCHO

and for the County of Merced



IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

RUSSELL G. COURTNEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
CENTRAL DIVISION

---

WM. MATTHEW BYRNE, JR.,  
United States Attorney,

ROBERT L. BROSIO,  
Assistant U. S. Attorney,  
Chief, Criminal Division,

600 U. S. Court House,  
312 North Spring Street,  
Los Angeles, California 90012,

**FILED**

AUG 3 1967

WM. B. LUCK, CLERK

Attorneys for Appellee,  
United States of America.





NO. 20769

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

RUSSELL G. COURTNEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
CENTRAL DIVISION

---

WM. MATTHEW BYRNE, JR.,  
United States Attorney,

ROBERT L. BROSIO,  
Assistant U. S. Attorney,  
Chief, Criminal Division,

600 U. S. Court House,  
312 North Spring Street,  
Los Angeles, California 90012,

Attorneys for Appellee,  
United States of America.



## TOPICAL INDEX

	<u>Page</u>
I      STATEMENT OF PLEADINGS DISCLOSING JURISDICTION	1
II     STATUTES INVOLVED	5
III    STATEMENT OF FACTS	8
IV    ARGUMENT	21
A.      GOVERNMENT COUNSEL'S REFERENCE IN ARGUMENT TO THE FAILURE OF THE DEFENSE TO CALL BEVERLY CAPUTO, THE APPELLANT'S WIFE, AS A WITNESS WAS PROPER UNDER THE DECISION OF THIS COURT IN BISNO v. UNITED STATES, 299 F.2d 711.	21
B.      THE EVIDENCE PRODUCED BY THE GOVERNMENT WAS RELEVANT AND MATERIAL TO THE CHARGES IN THE INDICTMENT.	24
1.      The Discovery of the Trick Books.	24
2.      The Court Did Not Err in Ruling That the Statements of Beverly Caputo to Loretta Hoskins in Furtherance of a Common Scheme and Plan Were Admissible Against the Appellant.	28
3.      The Testimony of Kathy O'Brien Was Properly Admitted in Impeachment and Rebuttal of the Defense Offered by the Appellant.	30
4.      The Government's Counsel's Questioning the Defendant Concerning Whether He Had Reported Income for the Year 1964 Was Proper Cross-Examination, and the Defendant's Response Was Properly Admitted For the Purpose of Impeachment.	33
5.      Hoskins' Testimony Concerning the Boat Trip Was Properly Admitted Into Evidence.	35



	<u>Page</u>
6. The Government Counsel's Questioning of Defense Witnesses Did Not Exceed the Proper Bounds of Cross-Examination.	36
C. GOVERNMENT COUNSEL WAS NOT GUILTY OF MISSTATEMENTS OF THE EVIDENCE TO THE JURY IN HIS CLOSING ARGUMENT.	41
D. THE JURY WAS PROPERLY INSTRUCTED TO CONSIDER KORNHABER'S STATEMENT ONLY AGAINST THE DECLARANT.	48
E. HOSKINS' TESTIMONY WAS NOT "INHERENTLY INCREDIBLE".	50
F. THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANTS' MOTION FOR A CONTINUANCE.	52
G. THE TRIAL COURT DID NOT DISPLAY BIAS AGAINST THE APPELLANT.	58
V CONCLUSION	67
CERTIFICATE	68





## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Abdul v. United States, 254 F.2d 292 (9th Cir. 1958)	27
Bass v. United States, 326 F.2d 884 (8th Cir. 1964)	63
Bisno v. United States, 299 F.2d 711 (9th Cir. 1962)	21, 22, 23, 24
Calhoun v. United States, 368 F.2d 59 (9th Cir. 1966)	49
Carbo v. United States, 7 L. Ed. 2d 769 (1962)	56, 58
Cohen v. Evening Star Newspaper Co., 113 F.2d 523 (D. C. 1940)	64
Corley v. United States, 365 F.2d 884 (D. C. Cir. 1966)	42
Cross v. United States, 353 F.2d 454 (D. C. Cir. 1965)	45
Delli Paoli v. United States, 352 U. S. 232, 1 L. Ed. 2d 278 (1956)	48, 49
Drew v. United States, 331 F.2d 85 (D. C. Cir. 1964)	29
Farris v. United States, 24 F.2d 639 (9th Cir. 1928)	50
Fernandez v. United States, 5 L. Ed. 2d 683 (1961)	56, 58
France v. United States, 358 F.2d 946 (10th Cir. 1966)	54
Fuentes v. United States, 283 F.2d 537 (9th Cir. 1960)	29
Haggard v. United States, 369 F.2d 968 (8th Cir. 1966)	49
Hanford v. United States, 365 U. S. 920 (D. C. 1966)	54



<u>Cases</u>	<u>Page</u>
Hawkins v. United States, 358 U.S. 74 (1958)	21
Herter v. United States, 27 F.2d 521 (9th Cir. 1928)	50
Ivey v. United States, 344 F.2d 770 (5th Cir. 1965)	29
Jackson v. United States, 353 F.2d 862 (D.C. Cir. 1965)	50
Johnston v. United States, 154 Fed. 445 (9th Cir. 1907)	48
Johnson v. United States, 347 F.2d 803 (D.C. Cir. 1965)	23, 42
Kotteakos v. United States, 328 U.S. 750, 90 L.Ed. 1557 (1945)	50
Lutwak v. United States, 344 U.S. 604 (1953)	29, 48
McClanahan v. United States, 230 F.2d 919 (5th Cir. 1956)	48
McMillan v. United States, 363 F.2d 65 (5th Cir. 1966)	41
Michelsen v. United States, 335 U.S. 469 (1948)	46
Namet v. United States, 373 U.S. 179 (1962)	21
Olender v. United States, 210 F.2d 795 (9th Cir. 1954)	29
In re Osborne, 344 F.2d 611 (9th Cir. 1965)	64
Parente v. United States, 249 F.2d 752 (9th Cir. 1959)	49
Pate v. Robinson, 383 U.S. 375, 15 L.Ed.2d 815 (1965)	54



<u>Cases</u>	<u>Page</u>
Peek v. United States, 321 F.2d 934 (9th Cir. 1963)	29
Pouncey v. United States, 349 F.2d 699 (D.C. Cir. 1965)	56
Powell v. United States, 347 F.2d 156 (9th Cir. 1965)	27
Reiss v. United States, 324 F.2d 680 (1st Cir. 1963)	49
Rossetti v. United States, 315 F.2d 86 (9th Cir. 1963)	49
Sachen v. United States, 343 U.S. 1 (1953)	50
Samish v. United States, 223 F.2d 358 (9th Cir. 1955)	23
San Frantella v. United States, 340 F.2d 560 (5th Cir. 1965)	21, 23
Sang Soon Sur v. United States, 167 F.2d 431 (9th Cir. 1948)	35
Smith v. United States, 267 F.2d 210 (9th Cir. 1959)	54
Storm v. United States, 94 U.S. 76, 24 L.Ed. 42 (1876)	60
Tallo v. United States, 344 F.2d 467 (1st Cir. 1965)	23
Twachtman v. Connelly, 106 F.2d 501 (6th Cir. 1939)	63
United States v. Annunziato, 293 F.2d 373 (2nd Cir. 1961)	28
United States v. Bentvea, 288 F.2d 442 (2nd Cir. 1961)	56
United States v. Blount, 229 F.2d 669 (2nd Cir. 1956)	33





<u>Cases</u>	<u>Page</u>
United States v. Curcio, 279 F.2d 681 (2nd Cir. 1960)	67
United States v. Dusky, 362 U.S. 402 (1959)	54
United States v. Kahaner, 317 F.2d 459 (2nd Cir. 1963), cert. denied 374 U.S. 835, reh. denied 375 U.S. 926	27
United States v. Knox Coal Co., 347 F.2d 33 (3rd Cir. 1965)	49
United States v. Olweiss, 138 F.2d 798 (2nd Cir. 1943), cert. denied 321 U.S. 801	29
United States v. Prince, 264 F.2d 850 (3rd Cir. 1959)	33
United States v. Terry, 362 F.2d 914 (6th Cir. 1966)	52
Wilson v. United States, 313 F.2d 317 (9th Cir. 1963)	28
Wong Sun v. United States, 371 U.S. 471 (1962)	48
Wyatt v. United States, 362 U.S. 525 (1959)	21

<u>Codes</u>	
18 United States Code §1503	3, 4, 7
18 United States Code §2421	1, 2, 3, 5
18 United States Code §2422	3, 6
28 United States Code §1291	5
28 United States Code §1294	5



IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

RUSSELL G. COURTNEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

I

STATEMENT OF PLEADINGS  
DISCLOSING JURISDICTION

On October 7, 1964, the Federal Grand Jury of the United States District Court for the Southern District of California, Central Division, indicted Russell G. Courtney and Barry R. Kornhaber. The indictment [C. T. 2-7] 1/ read as follows:

Count One [18 U.S.C. §2421]:

On or about May 15, 1964 the defendant Russell G. Courtney, knowingly transported Loretta Hoskins, a woman, in interstate commerce to Las Vegas, Nevada, from Los Angeles County,

---

1/ "C. T." refers to Clerk's Transcript.



California, within the Central Division of the Southern District of California; for prostitution, debauchery, and other immoral purposes.

Count Two [18 U.S.C. §2421]:

On or about May 18, 1964, the defendant Russell G. Courtney, knowingly transported Loretta Hoskins, a woman, in interstate commerce from Las Vegas, Nevada, to Los Angeles County, California, within the Central Division of the Southern District of California, for prostitution, debauchery, and other immoral purposes.

Count Three [18 U.S.C. §2421]:

On or about May 22, 1964, the defendant Russell G. Courtney, knowingly transported Loretta Hoskins, a woman, in interstate commerce to Las Vegas, Nevada, from Los Angeles County, California, within the Central Division of the Southern District of California, for prostitution, debauchery, and other immoral purposes.

Count Four [18 U.S.C. §2421]:

On or about June 7, 1964, the defendant Russell G. Courtney, knowingly transported Loretta Hoskins, a woman, in interstate commerce from Las Vegas, Nevada, to Los Angeles County, California, within the Central Division of the Southern District of California, for prostitution, debauchery and other immoral purposes.

Count Five [18 U.S.C. §2421]:

On or about June 12, 1964, the defendant Russell G. Courtney, knowingly transported Loretta Hoskins, a woman, in interstate commerce to Las Vegas, Nevada, from Los Angeles County,





California, within the Central Division of the Southern District of California, for prostitution, debauchery, and other immoral purposes.

Count Six [18 U.S.C. §2422]:

On or about June 12, 1964, the defendant Russell G. Courtney, knowingly persuaded, induced, enticed, and coerced Loretta Hoskins, a woman, to go into interstate commerce to Las Vegas, Nevada, from Los Angeles County, California, in the Central Division of the Southern District of California, for prostitution, debauchery, and other immoral purposes and with the intent that said Loretta Hoskins engage in the practice of prostitution, and thereby knowingly caused said Loretta Hoskins to go and to be carried and transported as a passenger upon the line and route of a common carrier in interstate commerce.

Count Seven [18 U.S.C. §1503]:

On or about July 29, 1964, in Los Angeles County, within the Central Division of the Southern District of California, Loretta Hoskins, appeared as a witness before a Federal Grand Jury in connection with an investigation and inquiry being had into possible violations of Title 18, United States Code, Sections 2421 and 2422, commonly known as the Mann Act. On or about July 30, 1964, the same Loretta Hoskins was subpoenaed to appear again before a Federal Grand Jury on September 30, 1964.

On or about August 5, 1964, in Los Angeles County, within the Central Division of the Southern District of California, defendant Russell G. Courtney and Barry R. C. Kornhaber corruptly



influenced, obstructed, and impeded, and endeavored to influence, obstruct and impede the due administration of justice by corruptly endeavoring to influence, intimidate, and impede and influencing, intimidating, and impeding the same Loretta Hoskins, who has been and was to be a witness before a Federal Grand Jury, in connection with testimony that the same Loretta Hoskins has given and to give before a Federal Grand Jury, in violation of 18, United States Code, Section 1503.

Courtney entered pleas of not guilty on all counts, and Kornhaber entered a plea of not guilty to Count Seven. The case was transferred to the Honorable Harry C. Westover, United States District Judge, for further proceedings. A jury trial was heard before Judge Westover on May 25, 1965 [C. T. 19]. The court dismissed Count Five of the indictment because it duplicated Count Six [C. T. 51]. On June 3, 1965, the jury was unable to reach a verdict, and the court declared a mistrial [C. T. 52]. On June 21, 1965, a motion for acquittal was denied and the case was transferred to the Honorable Irving Hill.

A motion for continuance of the jury trial was denied on September 10, 1965 after a hearing before Judge Hill. The second jury trial began on September 15, 1965 [C. T. 94]. On October 1, 1965, Russell Courtney was found guilty by a jury of all six remaining counts of the indictment. Kornhaber was found not guilty of Count Seven [C. T. 105].

On October 22, 1965, Courtney was sentenced to four years for Counts One, Three and Six to be served concurrently and to



four years for Counts Two, Four and Seven, to be served concurrently, but consecutively with Counts One, Three and Six [C. T. 112]. Timely appeal was entered by Courtney on October 26, 1965. Bail on appeal was set at \$25,000 and application to proceed in forma pauperis was taken under advisement by the court on October 28, 1965 [C. T. 114]. Courtney's motion for reduction of bail to \$10,000 was denied on December 13, 1965 [C. T. 118].

On February 24, 1966, Russell Courtney's motion to appeal in forma pauperis was granted.

The United States Court of Appeals for the Ninth Circuit has jurisdiction to entertain these appeals and to review the judgments of the District Court pursuant to Title 28, United States Code, Sections 1291 and 1294 (1).

## II

### STATUTES INVOLVED

Title 18, United States Code, Section 2421 provides as follows:

"Whoever knowingly transports in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or





"Whoever knowingly procures or obtains any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in the District of Columbia, or any Territory or Possession of the United States, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in the District of Columbia or any Territory or Possession of the United States . . .

"Shall be fined not more than \$5,000 or imprisoned not more than five years, or both. "

Title 18, United States Code, Section 2422, provides as follows:

"Whoever knowingly persuades, induces, entices, or coerces any woman or girl to go from one place to another in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution



or debauchery, or any other immoral practice, whether with or without her consent, and thereby knowingly causes such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, shall be fined not more than \$5,000 or imprisoned not more than five years, or both."

Title 18, United States Code, Section 1503, provides as follows:

"Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented



her \$1,000 a week if she would become a prostitute [R. T. 474].

At first Hoskins did not want to be involved in prostitution, but after later conversations and much persuasion by Courtney, she agreed to have some prostitution dates [R. T. 345]. She had debts and financial problems and wished to move closer to town [R. T. 345-346, 478]. Hoskins agreed to Courtney's insistent proposals in the third week of April [R. T. 346, 475].

After Courtney insisted that Mrs. Hoskins make \$500 for him, he took her to see his girl friend, Rene Dubeau, whose real name was Beverly Caputo <sup>3/</sup> [R. T. 347, 349]. At this time, Caputo was living at the Casa de Oro Apartments on El Cerrito in Hollywood [R. T. 347, 335]. Since Caputo was not at the apartment, but on an appointment when they arrived, Courtney used a key to let Hoskins in and told her to wait for Caputo and then left [R. T. 348].

Seven hours later, at 10:00 A. M. , Caputo came in [R. T. 348]. Shortly thereafter, a man came to the apartment and was introduced to Hoskins by Caputo. He had an appointment for a prostitution date with Caputo, but after meeting Hoskins he indicated he preferred to utilize her services [R. T. 349]. When Hoskins realized why he was at the apartment, she left the main room of the studio apartment and went into the kitchen and then to the bathroom [R. T. 350]. Caputo followed her into the bathroom and tried to persuade her to go back to the main room. Caputo

---

<sup>3/</sup> Beverly Caputo was married to Russ Courtney between the first and second trial. She is hereafter referred to as Beverly Caputo.





finally pushed her out of the bathroom [R. T. 350]. Hoskins returned to the bathroom where Caputo again attempted to convince her to have the prostitution date [R. T. 350-351]. She told Hoskins to take off her clothing and go out to the man [R. T. 351]. Hoskins finally followed these directions and had a prostitution date for which she was paid \$20 [R. T. 351]. This money, plus \$5.00 of her own, was placed in a Band-Aid box which Caputo showed her [R. T. 351-352]. The extra five dollars was placed in the box because the date ordinarily paid \$25 and Courtney was expected to pick up the money that evening [R. T. 352].

Courtney came to the apartment later and was told by Caputo about Hoskins' prostitution date [R. T. 353]. Courtney promised the new recruit that she would get more money and have many prostitution dates [R. T. 354].

Caputo and appellant showed Hoskins how to use the "trick books". The "trick books" contained lists of former customers' names and are used to make prostitution dates [R. T. 355-360].

Hoskins had never been a prostitute before she was taken to the El Cerrito Street Apartment with appellant [R. T. 467, 473]. Hoskins worked as a prostitute for Courtney from approximately May 1 to June 13, 1964 [R. T. 469].

At Caputo's El Cerrito Apartment, Hoskins had other prostitution dates which Caputo made for her by calling men whose names were in the trick books [R. T. 360]. Courtney was present when these calls were made and suggested prospective customers to Caputo [R. T. 361]. Appellant took money earned on the



prostitution dates of Hoskins [R. T. 360].

When Courtney became worried about some suspicious sounding phone calls and complaints of noise and pedestrian traffic in the apartment house, they moved to the Hart Apartments. The two women rented the apartment under the names of Helen Cain and Geraldine Brooks on May 6, 1964 [R. T. 363, 314-315]. At this second "trick pad", Hoskins had about 15 to 20 prostitution dates a day [R. T. 367]. The manager of the Hart Apartments observed that there was an unusual amount of traffic on the elevator when they used the apartment and that the traffic decreased when they left [R. T. 327]. Courtney was seen several times around the apartment [R. T. 324-326]. The apartment was partially furnished with Hoskins' furniture.

Shortly after moving into the Hart Apartments, the two women made the first of several trips to Las Vegas [R. T. 368]. They used appellant's white 1963 Thunderbird because they were too late to purchase airplane tickets [R. T. 369].

Courtney told the women to take his car to Las Vegas and check into the New Frontier Hotel. He also instructed them to park away from the hotel and to use a false address when they registered [R. T. 369-370]. Names of individuals to contact in Las Vegas were given to them. Appellant strongly warned them not to go to the Thunderbird or Castaways for any reason, but to concentrate on the Sands and Dunes [R. T. 371]. This trip was charged at Count One of the indictment.

The trip lasted for the weekend, but no acts of prostitution



were committed because the women were unable to contact customers [R. T. 372]. They telephoned appellant who was in Los Angeles and informed him of their lack of success [R. T. 372]. Courtney told the women to return to Hollywood within four hours [R. T. 374].

On their way back from Las Vegas (Count Two of the indictment), Hoskins received a traffic ticket for speeding [R. T. 374-375; 294-295]. They went to the Kraft Avenue residence which Courtney rented under the name, Jason Russell <sup>4/</sup> [R. T. 273]. Hoskins and Caputo were apprehensive because appellant was furious and threatened them. Russell Courtney then beat Hoskins and Caputo [R. T. 375-376]. Beverly Caputo was so severely beaten that she had a seizure and they had to call an ambulance [R. T. 376-377]. After they took Caputo to the hospital, appellant said that he would make Hoskins read a script into a tape recorder so that she would not want to report Courtney to the police [R. T. 377]. Hoskins told appellant that "this was not the life for her" [R. T. 380]. She stayed in prostitution for Courtney because she was frightened of him, particularly in view of the beating he had administered to her and Caputo [R. T. 484].

When Caputo was released from the hospital, Courtney and Hoskins took her back to the Kraft Avenue residence [R. T. 380]. Courtney had Hoskins call some friends of Caputo and ask them for

---

<sup>4/</sup> When the real estate licensee of the Kraft Avenue residence visited the residence she met Caputo who introduced herself as Mrs. Russell [R. T. 276-277; 281-282].





help because Caputo was ill [R. T. 381]. This led to a prostitution date and more money in Courtney's pocket [R. T. 407].

In May of 1964, Courtney accompanied Hoskins on her second trip to Las Vegas (Count Three), because Hoskins had not made any money on the last trip [R. T. 408]. They left on a Friday night in appellant's Continental [R. T. 407-408].

In Las Vegas, Courtney checked into the Three Coins Motel while Hoskins waited in the car. The appellant registered at the motel on May 23, 1964 under the name of R. Santos. The motel manager verified the fact that Hoskins accompanied Courtney [R. T. 218-220; 409].

Hoskins had prostitution dates on this trip at various hotels in Las Vegas and turned over all the money from the dates to Russell Courtney [R. T. 409]. On one occasion, while at the Three Coins Motel, the appellant hid in the closet while Hoskins had a prostitution date in the motel room [R. T. 410-411]. Mr. Dielman, the motel manager, noticed that one night a third person stayed in the room [R. T. 223]. He also noticed that Mrs. Hoskins went out every evening and received several telephone calls [R. T. 223]. Mr. Dielman called a cab for her practically every evening [R. T. 225].

While in Las Vegas, Mr. Courtney took Mrs. Hoskins to meet a friend of his, Bill Wagoner, who made an appointment for her to see the bell captain at the Desert Inn Hotel who they thought would facilitate her prostitution activities [R. T. 413-414]. But no working arrangement could be reached because the bell captain did



not want to use the switchboard and appellant objected to paying a 40% commission on all prostitution dates [R. T. 414-415]. Finally, when the bell captain complained that he had seen Mrs. Hoskins working the Desert Inn Hotel, Courtney agreed to pay him a 40% commission on every prostitution date that he actually arranged [R. T. 415].

Courtney stayed in Las Vegas until May 27, 1964 when he told the Three Coins Motel manager that he was leaving and that he would take care of the costs of his wife's stay [R. T. 222; 1023].

Before Courtney left Las Vegas, Hoskins gave him \$500 and wired more money to him in Los Angeles. Western Union sent a \$200 money order to appellant on May 29, 1964 and a \$225 order to him on May 31, 1964 [R. T. 252-254]. The money used to purchase the orders was from prostitution and sent to Courtney under the alias of Roxanne Leonard pursuant to Courtney's instructions [R. T. 412].

A few days later, appellant returned to Las Vegas and met Hoskins at the Thunderbird Hotel. That night she gave Courtney the money she had earned from prostitution since she had sent him the money orders [R. T. 416].

Russell Courtney directed Mrs. Hoskins to rent an apartment at the Flamingo Park Apartment on Fredda Street in Las Vegas under the name Roxanne Leonard [R. T. 416]. On June 4, she went to the apartment house and Courtney waited outside in his Continental [R. T. 260]. When Mrs. Conry, the hotel manager, would not accept a deposit check from Hoskins, she went out to



appellant who gave her \$100 in cash [R. T. 261-262; 418-419]. The night before, Hoskins had taken the check which she attempted to give to Mrs. Conry from a customer, contrary to appellant's instructions [R. T. 417]. Courtney helped her to move into the apartment [R. T. 419]. Appellant then returned to Los Angeles.

Within a few days Courtney returned to Las Vegas accompanied by Caputo, where he found Hoskins at the Thunderbird Hotel contrary to his instructions. He signaled her to go outside. Outside the hotel, Courtney shouted at her and took \$150 from her purse [R. T. 421-422]. Then he had Hoskins drive him and Caputo to the airport [R. T. 422]. Hoskins continued to engage in prostitution in Las Vegas. Hoskins gave the proceeds from her dates to Courtney [R. T. 423-424]. Courtney had given her detailed instructions to be followed when she "hustled" bars in Las Vegas [R. T. 539].

Courtney brought Caputo back to Las Vegas in Hoskins' red LeMans [R. T. 422]. This was apparently soon after the ten-day period when the manager of the Hart Apartments observed that she did not see either Caputo or Hoskins at the apartment, but saw the LeMans parked in the garage [R. T. 326].

In Las Vegas Courtney told Hoskins and Caputo to go to Downtown Las Vegas and attempt to make dates with soldiers on leave, but they could not make prostitution dates with the soldiers as Courtney had anticipated [R. T. 424-425].

After experiencing this lack of success, the trio left Las Vegas and returned to the Kraft Avenue residence in Courtney's





Continental, as charged in Count Four of the indictment [R. T. 425]. Upon their arrival, Hoskins discovered that all of her furniture had been moved from the Hart Apartments to the Kraft Avenue residence. When she inquired of Courtney as to why this had been done, he replied that he owned it all and her also [R. T. 426]. Because the Hart Apartments was no longer available and because Caputo's children from a prior marriage were staying at the Kraft Avenue residence, the trio had to use an apartment belonging to one of Courtney's friends for prostitution dates [R. T. 426-427].

On June 12, 1964, Hoskins and Caputo flew to Las Vegas by Western Air Lines [R. T. 309-311; 427-429]. Courtney gave further instructions to them for the trip and warned them that he wanted them to make "6 bills" in Las Vegas for him [R. T. 430]. He also told them that a boat trip was planned and that a movie (possibly pornographic) would be made on the trip [R. T. 431-432].

In Las Vegas, they went to the Flamingo Apartments where Hoskins and Caputo worked as prostitutes [R. T. 433]. Mrs. Hoskins tried to stay away from the apartment because she had not made the \$600 for Courtney and because she did not want to become involved in the planned boat trip or movie [R. T. 434]. When she drove by the apartment, she saw a car which she recognized as being that of one of Courtney's associates. She stayed away because she did not want to see Courtney [R. T. 434]. Finally she went to the police and told them the complete story of her activity in prostitution [R. T. 434]. She told the police that she wanted to stop being a prostitute, but she could not get away from Courtney and



she asked them for help [R. T. 435; 485]. The talk with the police led to Courtney's arrest. Later, on June 15, 1964, after Courtney was released, appellant sent a telegram to Hoskins which asked her for money and for her to call him [R. T. 436-437].

In July of 1964, Mrs. Hoskins was interviewed by the F. B. I. and appeared before the Grand Jury in Los Angeles [R. T. 437-438]. She was subpoenaed to appear before the Grand Jury on September 30, 1964 [R. T. 439].

On July 7, 1964, Officer George Sellinger of the Los Angeles Police Department, acting in an undercover capacity, went to the Kraft Avenue residence [R. T. 540-542]. When he knocked at the door, he was met by Caputo [R. T. 542-543]. After he entered the apartment he gave Caputo \$100 in payment for a prostitution date [R. T. 543]. She placed the money in a box in the rear bedroom.

Officer Sellinger then summoned Officer McGuire of the Police Department who searched the house and discovered the trick books [R. T. 550-551]. The trick books were the same books that Hoskins had used when she worked for Russell Courtney [R. T. 355-360].

On August 5, 1964 (Count Seven of the indictment), Hoskins went to the Purple Onion to look for Kornhaber, who was at the time an owner and the manager of the Purple Onion, so that she could get back a typewriter she had loaned to him [R. T. 441, 614].

They arranged a meeting at the Cafe de Paris on Sunset for August 5, but it was closed so they went to the Plush Pup and talked [R. T. 442-443]. Kornhaber told her that Courtney wanted to talk



Grand Jury and talked to the F. B. I. about Courtney's activities, appellant pleaded with her because he was afraid of the consequences [R. T. 453-455]. Then Courtney threatened to notify her family, especially her brother [R. T. 455-456]. She went home, and Kornhaber and Courtney called her there a few minutes after she returned [R. T. 457].

A second meeting between Courtney and Hoskins was arranged by Kornhaber at Antoine's Restaurant, but since Courtney did not appear there, the group went to the Luau Restaurant to meet him. At the Luau the discussion commenced at Sherry's continued [R. T. 459]. When the Luau closed, they went to the MFK Drug Store, and throughout the night, the same promises and threats were repeated [R. T. 461]. Courtney and Kornhaber gave Hoskins a note to read which stated appellant had nothing to do with prostitution and that she had lied to the authorities [R. T. 462]. Hoskins finally gave in to the threats and promises, copied over the note and signed it [R. T. 462-463].

Courtney's defense attempted to show that he was not involved in prostitution by showing how he made his money from the twist contests [R. T. 620-621; 655-656; 718]. Appellant owned two expensive cars and paid \$220 a month rent at the Kraft Avenue residence [R. T. 1001]. He stated that his average weekly income in 1964 was \$200 - \$250 [R. T. 1016]. But he made less than \$100 over a three or four-week period when he ran dance contests twice a week at the Purple Onion Cafe [R. T. 1102-1103]. Courtney's dance partner expressed uncertainty as to how much





appellant did make as a dancer [R. T. 718-722].

Appellant claimed that brutality and harassment by the police led to his arrest and prosecution [R. T. 785-786]. The defense attempted to raise the specter of conspiracy and plots by the police and parole office [R. T. 744-748]. Officers and investigators testified that they did not harass appellant or physically attack him [R. T. 1163]. An official with the Department of Correction testified that it was standard procedure for parole agencies and the police to work together in individual parole cases [R. T. 1188-1191].

Courtney claimed he was not involved in the prostitution business, though he admitted that he was very knowledgeable on the subject [R. T. 1005-1006].

The Government established that appellant had convinced Kathleen O'Brien to work with another girl, Laura Naples, in prostitution [R. T. 1120]. O'Brien had prostitution dates and gave the money from them to Courtney [R. T. 1122]. Courtney told O'Brien to call Caputo if she needed prostitution dates [R. T. 1121].



## IV

### ARGUMENT

#### A.

GOVERNMENT COUNSEL'S REFERENCE IN ARGUMENT TO THE FAILURE OF THE DEFENSE TO CALL BEVERLY CAPUTO, THE APPELLANT'S WIFE, AS A WITNESS WAS PROPER UNDER THE DECISION OF THIS COURT IN BISNO v. UNITED STATES, 299 F.2d 711.

---

Since the time of the Star Chambers, Courts have recognized the marital privilege, but it is recognized as a Common Law privilege, not a constitutionally protected right as appellant attempts to establish. Hawkins v. United States, 358 U.S. 74 (1958). As a common law privilege, the marital privilege is not allowed the same unlimited protection given to constitutional rights such as the right against self-incrimination. Wyatt v. United States, 362 U.S. 525 (1959).

The references to Mrs. Courtney throughout the trial were not part of a scheme to prejudice appellant, as in San Frantella v. United States, 340 F.2d 560 (5th Cir. 1965). The prosecution merely made a few reasonable comments or references to the relation between Caputo and Courtney which comments were not part of a plan or scheme to abridge the privilege. Namet v. United States, 373 U.S. 179, 189 (1962). The references to Caputo were absolutely necessary because as shown by the Statement of Facts she was a party to the prostitution activities in both Las Vegas and Los Angeles and played a primary role in recruiting Hoskins into



prostitution.

Reasonable comment by the government upon the refusal of the wife to testify does not abridge the privilege. Bisno v. United States, 299 F.2d 711 (9th Cir. 1962).

"The decision to testify on behalf of her husband rested solely with his wife. We do not believe that Bisno can rely on a privilege personal to his wife, in order to defeat adverse comment by the government. The failure of Bisno to make any attempt to produce her testimony when he alone had the opportunity to do so was a proper subject of comment." Bisno v. United States, supra, at p. 722.

Every comment upon Courtney and Caputo's relationship comes within the scope of this doctrine. In his opening statements, the prosecutor explained to the jury how Caputo was involved in a common plan to use Hoskins in interstate transportation for prostitution [R. T. 191]. References to Caputo throughout the trial were absolutely necessary in order to show Courtney's activities in interstate prostitution because Caputo was an essential instrument in appellant's operation, from Hoskins' first trick in Caputo's apartment to her work in Las Vegas. But while references were made to Caputo's part in the common plan, the Court sustained objections to questions on the purpose of her marriage to Courtney [R. T. 1153] and instructed the jury to disregard the statements by Kathy Lamonte on the purpose of their marriage [R. T. 1182-1183]. The government also showed its respect of the privilege by with-





drawing questions which attacked the validity of the marriage [R. T. 1152-1154]. Throughout the trial, every possible step was taken by the court to protect appellant's rights, but the court wisely did not allow the privilege to be used to defeat references to the common plan to use Hoskins in interstate prostitution.

In the government's argument to the jury, adverse comment was made to the fact that Beverly Caputo was not called as a witness when she could have explained the purposes of the trips to Las Vegas [R. T. 1309; 1334-1335; 1423-1424]. Caputo could only be produced to testify by the defense and when she was not called as a witness, the prosecutor was privileged to make adverse comments upon this. Bisno v. United States, *supra*, at 722. The United States Attorney's arguments never went beyond the propriety of reasonable comment.

"Closing arguments may also focus on the failure of defense witnesses to explain certain incriminating circumstances or the opposing party's failure to call as witnesses persons peculiarly within his control."

Johnson v. United States, 347 F.2d 803, 805 (D. C. Cir. 1965). Also see Samish v. United States, 223 F.2d 358 (9th Cir. 1955).

The Bisno problem has never been reached in other Circuits, but the recent cases have allowed the privilege to be asserted outside the presence of the jury. Tallo v. United States, 344 F.2d 467 (1st Cir. 1965); San Frantello v. United States, 340 F.2d 560 (5th Cir. 1965). The privilege was similarly protected by this



Court. All discussion of the privilege was in the Judge's Chambers.

The comments made by the government were of slight effect upon the total course of the trial. They were definitely within the scope of reasonable comment and did not have a prejudicial influence upon the jury.

In conclusion, the comments by the prosecution upon Caputo and Courtney's marriage were proper under the Bisno v. United States case, and do not constitute error.

## B

### THE EVIDENCE PRODUCED BY THE GOVERNMENT WAS RELEVANT AND MATERIAL TO THE CHARGES IN THE INDICTMENT.

---

Appellant's brief accuses the government trial counsel of massing a great quantity of irrelevant, inflammatory, and inadmissible evidence against Courtney purely for the purpose of showing him to be a bad man. A detailed examination of the basis presented for this serious charge reveals that it lacks foundation.

#### 1. The Discovery of the Trick Books.

---

On July 7, 1964 Officer Sellinger of the Los Angeles Police Department, acting in an undercover capacity, visited Beverly Caputo at the 4734 Kraft Avenue residence and paid her \$100 which was to be in payment for her services as a prostitute [R. T. 545]. In view of Caputo's actions other officers entered the premises,



arrested her and searched the residence, finding a number of trick books and parts of trick books concealed in various areas of the residence [Government Exhibits 18, 19, 20, and 22; R. T. 548-551]. Defendant's counsel withdrew any objections to the search and seizure of the exhibits [R. T. 399].

Appellant's counsel, however, attacks the evidence offered by the government concerning the circumstances of the seizure.

The trial court ruled that " . . . corroboration, first, of how and from whom these books were obtained is relevant evidence. It seems to me that corroboration of Caputo as a prostitute, if reasonably related in time is relevant evidence. " [R. T. 404].

In the light of the evidence earlier admitted in the government's case the ruling was correct.

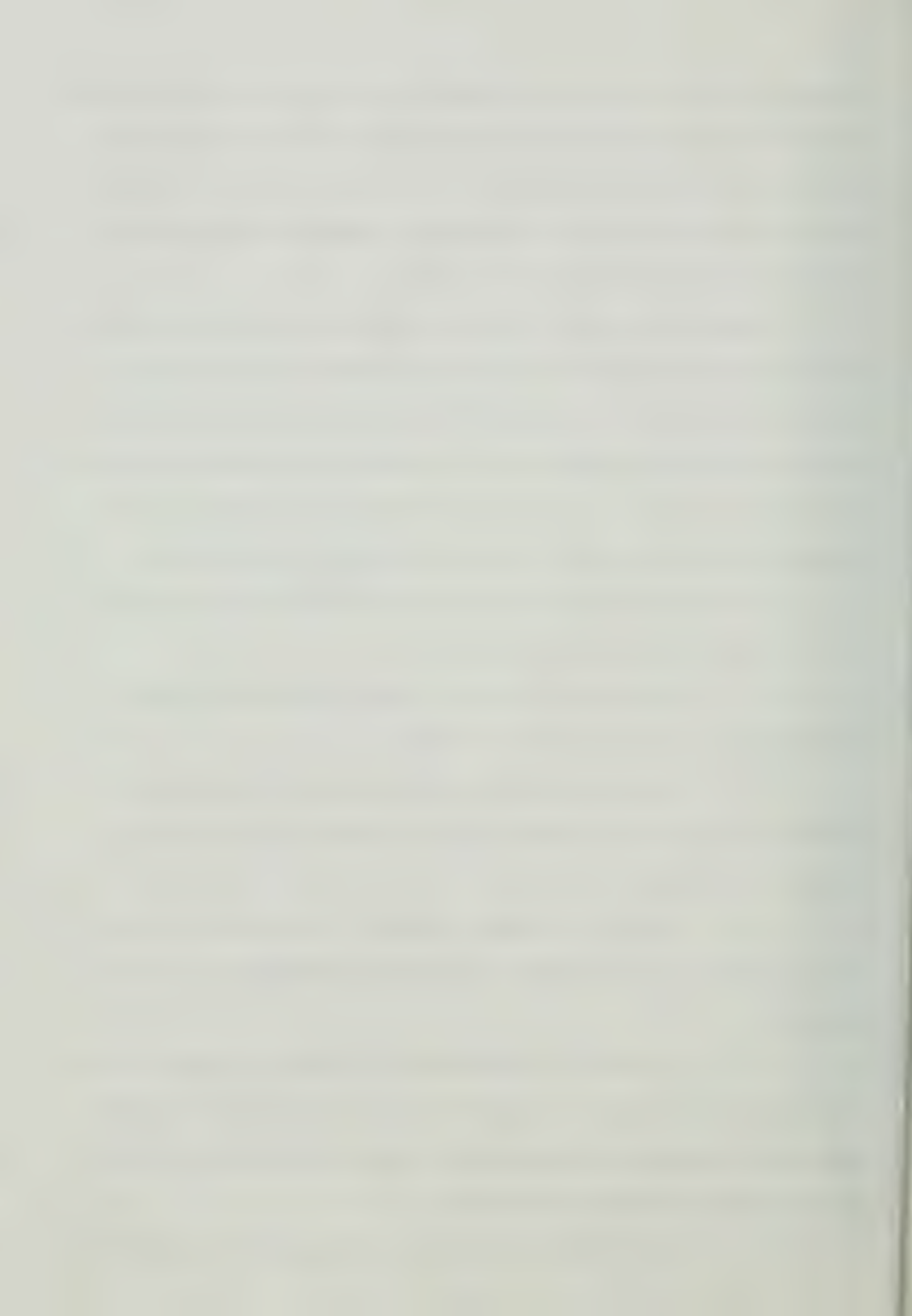
a. Courtney had enlisted Caputo's aid in recruiting Hoskins as a prostitute [R. T. 347-351].

b. Courtney and Caputo had shown the trick books in question to Hoskins and explained their contents and purpose to her [R. T. 355-360].

c. Courtney had rented the Kraft residence under an assumed name and lived there with Hoskins and Caputo [R. T. 273; 426-427].

d. Courtney had expressed the desire to Hoskins to use the Kraft address as a "trick pad" and had only temporarily been thwarted in his plans by the fact that Caputo's children were also living at the address [R. T. 426-427].

e. Under Courtney's direction Hoskins and Caputo had





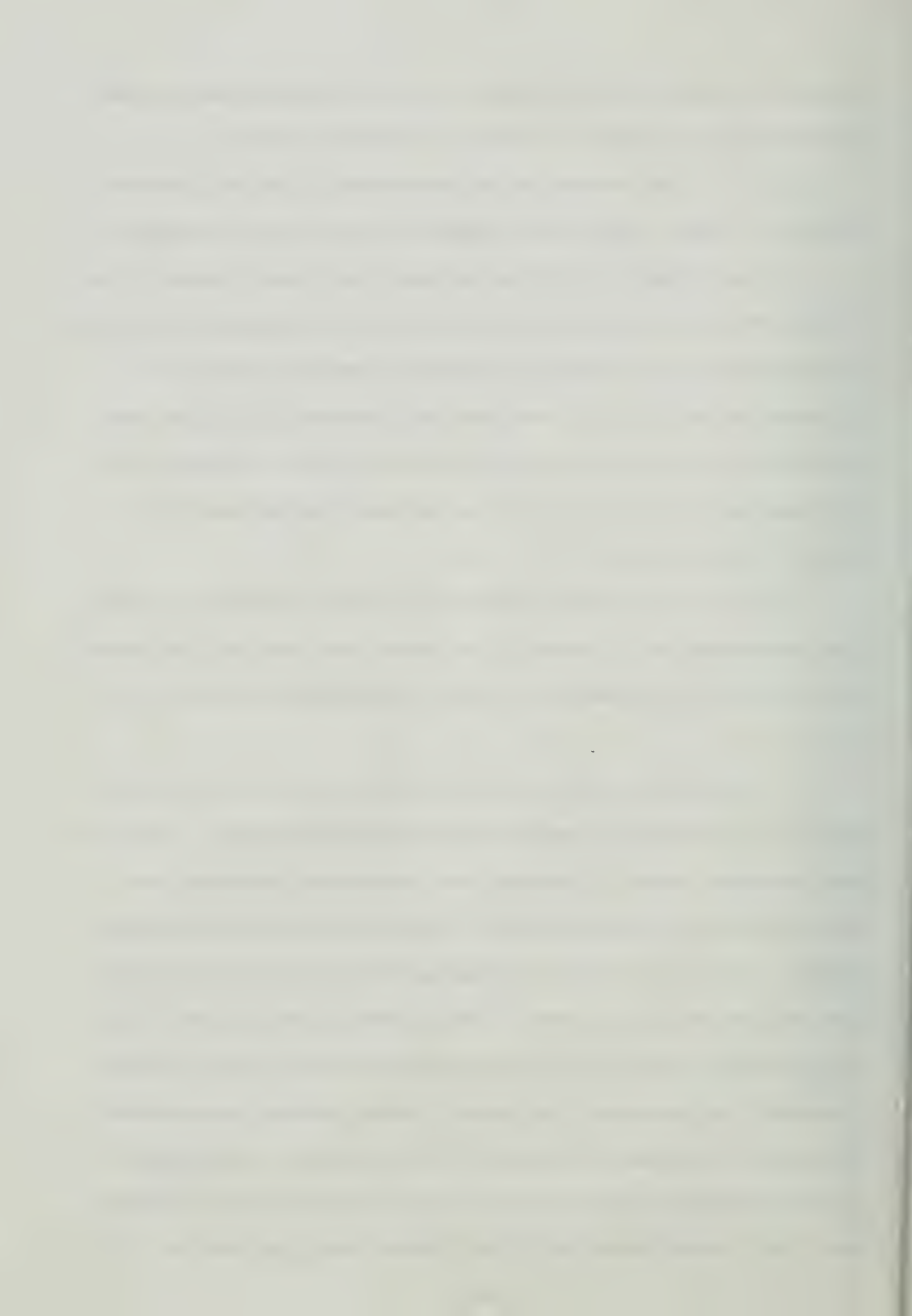
operated together as prostitutes in both the Los Angeles area and Las Vegas [R. T. 360; 367-368; 372; 426-427; 433].

f. The offered act of prostitution by Caputo occurred only a few weeks after the last Mann Act count in the indictment.

The testimony of Officer Sellinger was also relevant in that it showed Caputo putting the \$100 in a box on the bureau [R. T. 544], a method previously utilized by Caputo in leaving money for Courtney to pick up. The testimony of the searching officer that the books were concealed in various places in the residence bore out Hoskins' testimony concerning the prior concealment of the same "trick books" [R. T. 355; 551].

Quite clearly then the testimony of both officers concerning the circumstances surrounding the search and seizure of the books was necessary to present this highly relevant information to the jury.

Appellant's counsel, however, particularly attacks the fact that the second officer testified that he arrested Caputo. The court had previously stated to counsel that evidence of an arrest was to be avoided by the prosecution [R. T. 405]. Certainly the mere fact of the arrest did not inject any substantial inflammatory evidence into the proceedings, in that it added nothing to the evidence properly admitted concerning Caputo's offered act of prostitution and the search and seizure of the books, except information necessary to a coherent telling of the facts. If the testimony concerning the arrest had been omitted, the testimony before the jury would have been that Caputo offered to "trick" Officer Sellinger and that



moments later other officers entered the premises and found the books. Most probably anyone hearing such evidence would realize that there had been an arrest. Omitting evidence of the arrest would have only served to have presented the facts in an unclear manner.

In view of the clear relevancy of the evidence concerning the seizure of the trick books, the trial court did not abuse its discretion in ruling on the admissibility of the testimony. The very cases cited in the appellant's brief support this conclusion. As the court stated in United States v. Kahaner, 317 F.2d 459 (2nd Cir. 1963), cert. den. 374 U.S. 835, reh. den. 375 U.S. 926:

" . . . the judge's conclusion that the relevance of this evidence outweighed any tendency to undue prejudice . . . was in no manner an abuse of discretion; indeed we think exclusion of the evidence would have been wrong. " (at p. 472).

The instant case certainly presents a factual situation totally analogous to Powell v. United States, 347 F.2d 156 (9th Cir. 1965) and Abdul v. United States, 254 F.2d 292 (9th Cir. 1958), where evidence was presented of criminal violations totally irrelevant to the charges in the indictment.



2. The Court Did Not Err in Ruling That  
The Statements of Beverly Caputo to  
Loretta Hoskins in Furtherance of a  
Common Scheme and Plan Were  
Admissible Against the Appellant.

---

Appellant claims that the trial court erred in allowing into evidence the statements made by Beverly Caputo to Loretta Hoskins at the El Cerrito Apartment on the night Hoskins performed her first act of prostitution.

As Hoskins testified, in the third week of April, she gave in to Courtney's insistent requests that she become a prostitute. Courtney then took her to the El Cerrito Apartment so that she could meet Caputo and be induced into prostitution. Later the same night Caputo introduced Hoskins to her first customer. Hoskins, still reluctant to join the unsavory profession, fled to the bathroom on two occasions where Caputo finally convinced her to bestow her favors on the customer for money; money which was left for Courtney in a band aid box in the bathroom [R. T. 345-352].

The basis for admissibility offered by the government at trial was that Caputo's statements were utterances contemporaneous with an independently admissible non-verbal act. United States v. Annunziato, 293 F.2d 373 (2nd Cir. 1961); Wilson v. United States, 313 F.2d 317 (9th Cir. 1963).

Quite obviously Courtney's recruiting of Hoskins was relevant to the Mann Act charges in the indictment that it was pertinent to his motive, intent, and purpose in sending Hoskins on the trips to Las Vegas. His actions in this regard, while evidence





of a local criminal violation were intimately related in a line of conduct which culminated in the interstate violations. In addition, evidence of other criminal acts are admissible to show motive and intent. Drew v. United States, 331 F.2d 85 (D. C. Cir. 1964).

Since Courtney utilized Caputo to aid him in recruiting Hoskins, her statements to carry out this criminal scheme were properly admitted against him.

"The notion that the competency of a confederate is confined to prosecutions for conspiracy has not the slightest basis; their admission does not depend on the indictment, but is merely an incident of the general principle of agency that the acts of any agent, within the scope of his authority are competent against his principal." United States v. Olweiss, 138 F.2d 798 at 800 (2nd Cir. 1943), cert. den. 321 U.S. 801.

See also Lutwak v. United States, 344 U.S. 604 (1953); Fuentes v. United States, 283 F.2d 537 (9th Cir. 1960).

The mere fact that the appellant chose as his confederate a girl whom he later married can in no way be thought to eliminate this basis for admissibility. None of the cases cited in appellant's brief concerning the use of a wife's hearsay statements against her husband involve instances where the wife while acting as a confederate in a common scheme and plan made statements in furtherance of that scheme or plan. Peek v. United States, 321 F.2d 934 (9th Cir. 1963), Olender v. United States, 210 F.2d 795 (9th Cir. 1954); Ivey v. United States, 344 F.2d 770 (5th Cir. 1965). For this



reason, the cited cases are totally inapplicable to the instant case.

3. The Testimony of Kathy O'Brien Was Properly Admitted in Impeachment and Rebuttal of the Defense Offered by the Appellant.

---

The keystone of the government's case was that the appellant, a pimp, caused Hoskins to become a prostitute, sent her to Las Vegas for prostitution purposes, and received substantial funds from this source of income.

In order to rebut this testimony by the main government witness, the appellant produced a large amount of evidence to show that from the time of his release from prison he had lived the life of a hardworking, law abiding person. Courtney himself testified on direct that his first job on obtaining his freedom was in a law office. He later worked at a Vic Tanny gym. From this gym work he turned to several pasttimes, all connected with dancing which included giving dancing lessons, organizing dance contests for pay, entering dance contests for the cash prizes offered. In addition the defense called numerous other witnesses who testified in regard to Courtney's legitimate money making activities. This defense testimony covered a broad period of time, namely from the time of Courtney's release from prison [R. T. 783-787; 947-948] to a period of time substantially after that covered by the offenses charged in the indictment [R. T. 776-777].

The obvious thrust of this evidence was to show that Courtney



had substantial legitimate earnings, that he was therefore not in need or dependent upon income derived from prostitution, and that, contrary to Hoskins' testimony, he was not in need of money from her prostitution activities, and had never demanded money from her.

Since the defense injected this issue in the trial, the defense opened the issue of Courtney's finances to rebuttal by the government. The door was even more widely opened by the appellant's statement on cross-examination that he never had anyone turning tricks for him anytime, at any place [R. T. 1005-1006].

After the statement by Courtney, the government pursued his relationship with Kathy O'Brien in early 1965. Courtney testified that while he knew her and had done her a favor which put her in debt to him, he had never had her turning tricks for him in his apartment, had never threatened her in order to get this money repaid, and had never arranged prostitution dates for her in conjunction with a Laura Naples or Beverly Caputo [R. T. 1008-1011].

Appellant's brief makes the rather astounding claim that Kathy O'Brien's testimony was essentially identical with that of Courtney concerning their relationship (Appellant's Brief, 65). Examination of her testimony reveals a very different story from that told by the appellant. O'Brien's name appeared in Exhibit 18, one of the trick books shown by Courtney and Caputo to Hoskins and later found at the Kraft Avenue address. O'Brien recognized a number of the names listed in the book as being her customers [R. T. 1134-1135].

When O'Brien faced a local charge for insufficient fund





checks, Courtney obtained the services of an attorney to represent her [R. T. 1132]. He also aided her by allowing her to stay at his apartment on Poinsettia Place [R. T. 1118]. Since Courtney felt that she " . . . owed him a year of her life" [R. T. 1119], he demanded money from her. When he felt that she was not paying him enough money, he demanded more payments from her and used physical force on her towards attaining this end [R. T. 1122]. In order to obtain money demanded by him, she followed his suggestion in turning a trick in conjunction with Laura Naples and also participated in a prostitution date with Beverly Caputo [R. T. 1120-1121].

The only possible interpretation of this testimony is that O'Brien acted as a prostitute under Courtney's demands and pursuant to his direction in order to give him money which he knew had as its source her prostitution activities. It is an obvious fact that one way a pimp can obtain a hold on a girl is by obtaining legal services for her and then forcing her to pay off by engaging in prostitution activities for his benefit. Courtney's connection with Beverly Caputo and Laura Naples and his source of customers enabled O'Brien to make some of the contacts necessary to obtain business. As O'Brien's testimony shows pimping may include far more than personally contacting the customers.

Since Courtney's testimony that he had never had any girls turning tricks for him any place at anytime [R. T. 1005-1006], plus the defense evidence that Courtney was a legitimate dancer not dependent on prostitution proceeds for a livelihood were directly



contradicted by O'Brien's testimony, her testimony was properly admitted for impeachment purposes.

In addition her testimony could have been admitted as similar subsequent acts to show Courtney's intent and purpose in sending Hoskins to Las Vegas. United States v. Blount, 229 F.2d 669, 671-672 (2nd Cir. 1956); United States v. Prince, 264 F.2d 850, 851-852 (3rd Cir. 1959).

The trial court, however, gave a limiting instruction to the jury that O'Brien's testimony could be considered for the limiting purpose of impeachment [R. T. 1140-1141]. The fact that the local activities did not contain the element of interstate transportation does not so detract from the basic similarity as to cause the testimony to be inadmissible. Certainly a local charge of sale of heroin would be admissible on federal charge for sale of heroin, despite the fact that the federal charge would contain different elements, either concerning illegal importation or failure to follow the requirements of the federal tax laws.

4. The Government's Counsel's Questioning the Defendant Concerning Whether He Had Reported Income for the Year 1964 Was Proper Cross-Examination, and the Defendant's Response Was Properly Admitted for the Purpose of Impeachment.
- 

As noted above, one of the main thrusts offered by Courtney in his defense was evidence purporting to show him as a hardworking person who had legitimate sources of income who did not and would not live off the earnings of prostitutes [R. T. 783-787; 947-948].



Once the defense adopted this line of defense, the government could not be foreclosed in inquiring into the details of his finances. Needless to say, such a penetrating inquiry into a Mann Act defendant's financial status and history would not be appropriate in every Mann Act prosecution. In the instant case the financial issue was injected into the trial by the defense, the government did not go beyond the proper bounds of cross-examination.

Courtney followed his statements concerning his work history on direct, by stating on cross that he averaged \$200 to \$250 a week from his legitimate sources of income in 1964 [R. T. 1016]. Government counsel then asked him if he had filed a return for 1964, the year of the Mann Act violations charged in the indictment. If the appellant had been a hardworking dancer (as contended by the defense) earning \$10,000 honest dollars in 1964, he would have in all likelihood have filed a return. If, on the other hand, the defendant had been a pimp, living primarily off the illegal earnings of prostitution including Hoskins and Caputo, as showed by the government's evidence, there would be considerably lower probability that he would report his earnings.

The relevance of the question and Courtney's statement that he had not filed a return were clear to the trial court which almost immediately gave the following limiting instruction:

"Ladies and gentlemen of the jury, let me re-emphasize that this defendant is not on trial for any alleged income tax violation. You are not to consider any such possible violation. This testimony has been





permitted for the single purpose of attempting, if it does, to impeach the witness' testimony concerning his income during the years in question, and for no other purpose.

So bear that in mind, please." [R. T. 1017].

Appellant cites and quotes Sang Soon Sur v. United States, 167 F.2d 431 (9th Cir. 1948) (Brief of Appellant, 71) in support of his contention that the cross-examination concerning the tax return was improper. Appellant states that the cited case is on point in that it " . . . involved an extraneous admission of income tax evasion." In fact the case involved a set of facts and legal questions totally unlike that of the instant appeal. In Sang Soon Sur a defendant being prosecuted for tax evasion was deprived of a fair trial by the action of the prosecutor in reading to the jury a statement made by the defendant to a Revenue Agent concerning his prior conviction for violation of the Federal opium laws. The government agrees that the material offered concerning the opium violation was of such an exceptionally inflammatory nature that reversal was inevitable. The government fails, however, to see its application to the instant case.

5. Hoskins' Testimony Concerning the  
Boat Trip Was Properly Admitted  
Into Evidence.

---

In testifying concerning her June 12, 1964 trip to Las Vegas, Count Five of the indictment, Hoskins narrated a conversation she had with Courtney concerning his plans for her at the point of



destination. He told her that he intended to get her into a house of prostitution. He also informed her that a friend of his was going to make a film on his boat on the lake (apparently Lake Mead) in which she would appear [R. T. 430-431]. Appellant interprets her testimony as stating that the film would be pornographic. Since she only stated that she was informed that the film would be " . . . like that camera and tape recorder the day we came back from Las Vegas on the first trip" [R. T. 432], the meaning of her testimony is rather unclear.

Assuming that the appellant's interpretation is reasonable the evidence was clearly admissible in proving Count Five, which charged Courtney with transporting her to Las Vegas " . . . for prostitution, debauchery, or other immoral purpose". Making a pornographic film would certainly constitute an "immoral purpose". Appellant's argument is, therefore, based on the contention that it was improper to admit evidence of statements by Courtney which outlined his immoral purposes in order to prove his immoral purpose. The invalidity of this argument is apparent on its face.

6. The Government Counsel's Questioning of  
Defense Witnesses Did Not Exceed the  
Proper Bounds of Cross-Examination.

---

Appellant contends that the record of trial reveals a pattern of improper cross-examination and impeachment by government counsel. As one of the allegedly flagrant examples of this conduct, appellant cites the cross-examination of Courtney concerning calls



made to the Kraft residence.

Courtney was asked whether or not he realized Caputo was receiving calls at this residence, rented by him and where he resided with Caputo, concerning prostitution dates. In responding to the question, Courtney volunteered the information that Caputo had received a call from Mr. Hall who had previously testified as a witness for the defense [R. T. 929-939; 984]. After Courtney introduced the subject of the call, government counsel questioned him further concerning the call. Courtney testified that he " . . . didn't actually speak to him. I answered the phone, and he said it was Bobby Hall, and that he wanted to speak to Beverly. "

Since Courtney's testimony in this second trial conflicted with this testimony in the first trial, the government read part of the transcript of Courtney's prior testimony to impeach him. In the earlier proceeding Courtney had testified that, "The day of the 7th I got a call from Bobby Hall and he said that he was a friend of Mr. Schwartz. " [R. T. 986]. This prior testimony indicating that Courtney had in fact talked to Hall was properly admitted in impeachment of his testimony that he hadn't really talked to Hall.

Although Courtney's prior testimony incidentally intended to show that Hall lied when he denied talking to Courtney at any time shortly before the Luau meeting [R. T. 938], the evidence was still properly admissible in impeachment of Courtney. Appellant's contention that the read testimony did not impeach Courtney and was only directed at Hall is simply not supported by the record.

Appellant also attacks the use of Courtney's prior testimony





to impeach him concerning his reasons for moving from the Paramount Apartment to the Kraft address. In his direct testimony Courtney attempted to explain his reasons for moving from one residence to another, apparently to show that the reasons were completely innocent and totally unconnected with using residences as trick pads.

In outlining his reasons for moving from Paramount Drive to the Kraft residence, he stated:

"Well, I had numerous reasons. I didn't really like the place, Paramount Drive. It was, I thought fairly expensive for what I was getting. And I saw this ad in the paper about this house on Kraft Avenue and went out and took a look at it. And even though the place was run down, it was a nice place." [R. T. 864].

On cross-examination Courtney repeated the same reasons for moving from Paramount Drive. Since the defense introduced the subject, the government had a right of full cross-examination. Since in the first trial Courtney had given a very different version of his reasons, the government had a right to impeach him with his prior testimony that he had, in fact, moved from the Paramount address because the police searched the apartment [R. T. 998-999]. This is simply another example of the appellant opening the door at trial and expecting to be immune from cross-examination.

Appellant also criticizes the government's cross-examination of Jerry Gutman, Courtney's highly sympathetic parole officer who testified in great detail regarding law enforcement's interest in



Courtney and Courtney's tearful complaints of police harassment. Through Gutman the defense was allowed to tell a story of harassment and persecution, including public humiliation which made it difficult for him to earn a living [R. T. 746-748]. Gutman's testimony also referred to an unproduced note from a parole supervisor which indicated the police interest in the appellant [R. T. 746].

In cross examining Gutman, government counsel asked the witness what the police had told him about their reasons for being interested in Courtney. The clear impression the defense had intended to create through the witness' testimony was that poor Courtney was the object of a cruel vindictive plot by the police. The government counsel's question was directed to showing that this impression was incorrect and that the police were not acting improperly in showing this interest in the parolee.

There can be no question from the record that the government received an answer which it did not expect but which the defense very probably expected and which at least dove tailed into the picture being presented by defense counsel.

After first objecting to the question, trial defense counsel withdrew the objection as follows:

"MR. STANLEY: I will withdraw the objection. It doesn't matter.

"THE COURT: Pardon?

"MR. STANLEY: I will withdraw the objection.



"THE COURT: You have no objection?

"MR. STANLEY: No, sir.

"THE COURT: Do I understand you have no objection sir.

"MR. STANLEY: No. I have no objection."

[R. T. 753].

Then Gutman gave his answer that a police office had told him "This nigger has no business with white women" [R. T. 753].

Unfortunately one can only guess at the respective expressions of prosecutor and defense counsel at hearing the answer.

The court immediately gave an instruction limiting the jury's consideration of the statement [R. T. 753].

Certainly the record of trial does not show the defense sought to play down "police harassment", as claimed by the appellant (Appellant's Brief 75) but that the claims of persecution were an integral part in of the defense strategy, a strategy furthered by Gutman's blockbuster answer.

Appellant brief makes a great point that although Courtney testified that on one occasion he had been manhandled by the police when his car was run over to the side of the road and dragged from his car, he did not state that he had been hit, struck, or slapped [R. T. 989]. According to this argument government counsel sinned grievously when he asked one of the officers in question whether Courtney had been hit, struck, or slapped by the officers on the occasion in question. While it would perhaps have been preferable for counsel to have used the same language in questioning the officer





which Courtney used in his testimony, to hold counsel in the heat of trial, counsel who has not had the luxury enjoyed by an appellate counsel of perusing a transcript, to such a standard would be unreasonable. Courtney had indicated that he had been the victim of police brutality. The testimony of the officer was properly admitted to refute such a contention.

C.

GOVERNMENT COUNSEL WAS NOT GUILTY  
OF MISSTATEMENTS OF THE EVIDENCE TO  
THE JURY IN HIS CLOSING ARGUMENT.

---

The allegation by the appellant that government counsel told the jury that the government possessed much evidence which had not been presented is not supported by the record. Defense counsel's argument had tried to emphasize the comparative lack of eye witness testimony other than that of Hoskins concerning Courtney's control and direction of Hoskins' prostitution activities. In essence, government counsel in his final argument pointed out to the jury that individuals involved in prostitution would seldom be eager to incriminate and embarrass themselves by offering such testimony. At no point did government counsel state that the federal investigators had uncovered evidence not before the jury which would have provided additional proof, if presented, that Courtney was guilty [R. T. 1418-1420, 1432].

The cases cited by appellant do not support the contention that such argument is improper. In McMillan v. United States,



363 F.2d 65 (5th Cir. 1966), a conviction was reversed because highly prejudicial hearsay testimony was presented to the jury and because the prosecutor, in argument, expressed his belief in the guilt of the appellant. Similarly not in point is Corley v. United States, 365 F.2d 884 (D.C. Cir. 1966) where a prosecutor seriously misstated the alibi testimony which was the heart of the defense case. Johnson v. United States, 347 F.2d 803 (D.C. Cir. 1965) involved a government counsel claiming that since defense counsel had not utilized the Jencks Act statements of government witnesses made available to him, statements which were not in evidence, the statements corroborated the witnesses' testimony.

Appellant's contention that the government counsel seriously misstated the evidence also does not find support in the record.

The chief example offered by appellant concerns counsel's references to the testimony of Kathy O'Brien and the trick books. Counsel stated that the evidence showed that the trick books which contained her name had been found in Courtney's Kraft residence despite Courtney's denial that the books had ever been at the residence [Counsel's argument - R. T. 1304, 1321, 1427; Courtney's testimony - R. T. 1054]. This statement of facts is in no way a misstatement of the evidence.

Appellant argues that government counsel misstated the evidence when he argued that the evidence established for purposes of impeachment that Courtney had arranged prostitution dates for O'Brien in conjunction with Laura Naples and Caputo. Although O'Brien stated that Courtney had not arranged dates for her, she



stated facts which could be reasonably interpreted as establishing that Courtney had arranged such dates for her. She testified in effect that Courtney had demanded money from her and suggested to her contacting Naples and Caputo for dates in order to earn the money. She stated she had contacted both of the other girls and had thereby obtained prostitution dates [R. T. 1120-1122]. The facts to which she testified showed Courtney arranged dates despite her preliminary answer that he had not arranged the dates. A problem of semantics, eliminated by the elucidating questions has been resurrected by appellant's brief.

Government's counsel's expressed scorn for Courtney's testimony that his financial transactions with O'Brien consisted merely of a generous favor on his part which created a debt owed him [R. T. 1335] was based on the inference properly drawn from her testimony that he had given her the money in order to obtain a hold on her and receive the proceeds of her prostitution activity.

Similarly government counsel did not misrepresent the testimony of Hoskins, Courtney, or Mrs. Courtney concerning the \$100 check incident at the Flamingo Park Apartments while Courtney testified that he had casually cashed a check for Hoskins [R. T. 944-945, 1039-1040] and had not pressed her for the money because it was a loan which he thought she was paid back, Hoskins testified that the check was the proceeds of her prostitution activities in Las Vegas (and therefore represented the property of her master)[R. T. 417]. Government counsel only emphasized in argument that there was this major conflict between the testimony





of Courtney and Hoskins in this regard.

Appellant next complains that governmental counsel misrepresented the testimony of Mr. Byrne, the former parole supervisor. His subordinate, Mr. Gutman, testified that the action of the police in contacting the parole officers concerning Courtney was most unusual [R. T. 751]. Mr. Byrne's testimony indicated that it was not an unusual occurrence [R. T. 1190-1191, 1194]. When government counsel stated in argument "Now, we called Mr. Byrne to testify that that just isn't the case; that more often than not, it's not an unusual practice at all . . ." [R. T. 1333], he only inartfully paraphrased Byrne's testimony, he did not misstate the evidence by saying that Byrne testified that such contacts usually occurred in all cases. Gutman's testimony that such contacts were "most unusual" and Byrne's testimony that such contacts were not unusual obviously conflicted -- a conflict which counsel had a duty and right to argue.

Yet another charge of misstatement of the evidence is raised by appellant's contention that there was no basis for counsel's argument that Courtney and Hoskins checked into the Three Coins Motel for the purpose of Hoskins turning tricks at the motel. Since Hoskins testified she did turn a trick of the motel while Courtney hid in the closet, counsel merely argued a reasonable inference supported by the evidence [R. T. 409-410].

The last allegation of misstatement of the evidence concerns government counsel statement that Mrs. Parsons testified that she had seen Courtney at one of the trick pads, the Hart apartments,



" . . . almost every day . . . " [R. T. 1420]. In fact Mrs. Parsons testified on direct that she had seen him at the apartment on numerous occasions [R. T. 324] but on cross retreated to saying she had seen him at the apartment on three or four occasions. Any possibility of prejudice to the appellant was eliminated by defense counsel's prompt objection, the court's direction to the jury that the jury's memory of the evidence should govern, and government counsel's statement that, "If my recollection does differ from yours, of course it is your recollection that governs. I am trying and I hope I haven't misstated anything." Where it is clear as here that no substantial prejudice could result from a misstatement of evidence, such a misstatement is harmless error and does not support a reversal. Cross v. United States, 353 F.2d 454 (D. C. Cir. 1965).

Trial defense counsel took a more realistic position than defense appellate counsel when he stated in argument that:

"The attorney in the courtroom -- and it is our job to remember the evidence -- we don't even recall the evidence correctly every time. We can't remember exactly what was said yesterday. And it's changed and that happens in practically every trial." [R. T. 1409].

Since the court carefully instructed the jury that they as the sole judges of the fact had a duty to scrutinize the testimony and that statements and arguments of counsel were not evidence [R. T. 1433, 1436, 1441] and since appellant has now shown any



substantial misstatements of evidence by government counsel, appellant's alleged error is without merit.

Coupled with the allegations of misstatements of evidence, appellant claims that counsel exceeded the bounds of argument by trying to argue the defendant should be convicted because of his "status" as a defendant, rather than on the basis of the evidence.

In support of this charge appellant notes that on several occasions counsel emphasized that the jury should consider Courtney's prior felony conviction for pimping in determining what weight they should give to his testimony [R. T. 1322, 1337, 1416]. The trial court gave the proper instruction to the jury, informing them as to the limited purpose for which they should consider the conviction [R. T. 1435-1436]. Since felony convictions can be used for impeachment purposes, counsel's conduct cannot possibly be considered as error. Michelsen v. United States, 335 U. S. 469 (1948).

Government counsel's argument [R. T. 1424-1425] that the jury could legitimately consider in determining Courtney's guilt or innocence the facts showed by the evidence that Courtney bore many of the earmarks of a pimp, namely that he admitted to detailed knowledge of prostitution, living with prostitutes, and taking money from prostitutes was proper argument based on inferences reasonably drawn from the evidence. Appellant apparently feels that a prosecutor should not be allowed to forcefully argue such inferences but should be limited to a dry recounting of testimony. Such a contention is not supported by any appellate





authority.

Appellant denounces government counsel's description in argument [R. T. 1317, 1325, 1327, 1328, 1332] of the social circle and places setting of events involved in the case as constituting a jungle. The evidence in the case presented by both prosecution and defense revealed a way of life and standards of conduct by almost all the parties involved which, hopefully have not been adopted by the mass of the American public. The term "jungle" is in constant use in this country to describe various problems and institutions. Examples may be found in Upton Sinclair's "The Jungle" (meat packing), "The Green Felt Jungle" (gambling), "The Asphalt Jungle" (crime), "The Blackboard Jungle" (the schools). This once colorful term of description is so overused in our society that it has lost any substantial impact it ever possessed. In this case the evidence merely showed another American jungle, the Sunset Strip-Las Vegas jungle.

Trial defense counsel apparently agreed that the evidence revealed a way of life more appropriate for the jungle. He realized that the members of the jury had possibly been shocked, even by Courtney's own testimony of his style of living. He, therefore, emphasized in his argument that there was such a "jungle" but stressed forcefully that not every male in it is a pimp. The term "jungle" appears in the defense argument far more often than in that of government counsel; it shows up at least seventeen times [R. T. 1343, 1341, 1350, 1351, 1357, 1358, 1361, 1369].

The use of would be colorful terms such as "jungle" is not



rare in final argument. In McClanahan v. United States, 230 F.2d 919, 926 (5th Cir. 1956) a prosecution for an V.A. housing fraud, the government counsel referred to the defendant as a profiteer and to the veterans utilized by him in the fraud scheme as the ". . . tentacles of an octopus". The court found that these words, in the context in which they were used did not go beyond proper comment and no harm resulted. This Court found that calling a defendant in an assault case a hired gun fighter and hired ruffian did not go beyond the proper limits of argument. Johnston v. United States, 154 Fed. 445 (9th Cir. 1907).

D.

THE JURY WAS PROPERLY INSTRUCTED TO  
CONSIDER KORNHABER'S STATEMENT ONLY  
AGAINST THE DECLARANT.

---

Statements made by a co-defendant are admissible against the declarant to prove the declarant's participation if proper instructions are given to the jury that they are only admissible against the declarant. Delli Paoli v. United States, 352 U.S. 232, 238 (1956); Lutwak v. United States, 344 U.S. 604, 619 (1952); Wong Sun v. United States, 371 U.S. 471, 490 (1962).

Kornhaber's statements to the F.B.I. were admitted as his declarations to prove his participation in the attempt to convince Hoskins not to testify.

Instructions were given to the jury to separate the declarations made by Kornhaber and to only consider them against



Kornhaber [R. T. 1446-1447]. They were the "proper cautionary instructions" as required by Federal case law. Haggard v. United States, 369 F.2d 968 (8th Cir. 1966). Possible prejudice may be overcome by clear instructions. Delli Paoli v. United States, 352 U.S. 232, 1 L.Ed.2d 278 (1956). Though the instructions were given at the end of the trial, and not at the moment of admission, their clarity and directness were sufficient to correct any possible prejudice to Courtney. A simple instruction is sufficient under normal circumstances unless further instruction is requested by counsel. Parente v. United States, 249 F.2d 752 (9th Cir. 1959).

When the declarations of Kornhaber were admitted, the appellant's counsel made no objection and requested no immediate instructions on the declarations [R. T. 572]. The appellant waived any objection to this admission and to any right to immediate instruction. Rossetti v. United States, 315 F.2d 86 (9th Cir. 1963); Reiss v. United States, 324 F.2d 680 (1st Cir. 1963).

"It has been held that where as here, no objection is entered or instructions, cautionary or otherwise, are requested, any post-trial objection to the admissibility of the testimony is waived."

United States v. Knox Coal Co., 347 F.2d 33 at 44 (3rd Cir. 1965).

No prejudice to the jury occurred by the instruction being given at the end of the trial. Calhoun v. United States, 368 F.2d 59 (9th Cir. 1966). If the judgment was not swayed by the lateness then no rights of the accused were affected by this procedure.





Kotteakos v. United States, 328 U.S. 750, 765, 90 L.Ed. 1557, 1567 (1945).

Furthermore, the lateness of the instruction could not be thought to even possibly effect any count for which Courtney was convicted other than the obstruction count since Kornhaber's statements only pertained to his alleged participation in the violation charged in that one count. Farris v. United States, 24 F.2d 639, 640 (9th Cir. 1928); Sachen v. United States, 343 U.S. 1 (1953).

The imprisonment for the obstruction charge is to be served concurrently with two of the Mann Act counts [R. T. 1511]. Thus any possible prejudice or error did not result in a longer term for Courtney.

#### E.

#### HOSKINS' TESTIMONY WAS NOT "INHERENTLY INCREDIBLE".

---

In determining whether Hoskins' testimony was inherently incredible, as claimed by appellant, and therefore inadequate to support the jury's verdict, this Court should give full consideration to the entire testimony of the witness. Herter v. United States, 27 F.2d 521 (9th Cir. 1928). The total picture of Hoskins' prostitution activities as recounted by her reveals nothing which would appear " . . . highly questionable in the light of common experience and knowledge . . . ". Jackson v. United States, 353 F.2d 862, 867 (D.C. Cir. 1965).



Appellant asserts that Hoskins' description of her first act of prostitution, coupled with testimony that she was soon thereafter seeing many customers a day, is unworthy of belief. Certainly after her first few dates her inhibition and reservations would tend to disappear. If Courtney supplied the customers, there is no logical reason why she could not serve them.

Nor is there anything unusual about Hoskins' testimony that on her first trip to Las Vegas with Caputo she was unsuccessful in finding clients while on her second trip she performed many "tricks". While on the first Las Vegas visit she was accompanied only by Caputo, on the second trip Courtney escorted her to insure that she would do some money-producing business [R. T. 368, 408]. Courtney's assistance and the beating he gave her and Caputo after the first financially disastrous trip would logically have substantial effect on her productivity. While appellant claims that Hoskins was not instructed on the second visit, the witness herself testified that she always worked under Courtney's directions [R. T. 539].

The fact that Hoskins could only specifically recall giving Courtney three instances when she gave Courtney money from her prostitution activities [totalling \$1075; R. T. 411-413, 422], is not startling in consideration of the amount of time which had passed between the trip and her testimony.

Hoskins' testimony which laid bare her own criminal activities in detail was obviously believed by the jury that saw and heard her testify. Since her testimony was by no manner or means incredible, it is sufficient to support the verdict. United States v.



Terry, 362 F.2d 914 (6th Cir. 1966).

Appellant further contends that it is beyond belief that Hoskins informed Courtney and Kornhaber that she had testified before the Grand Jury and been questioned by agents of the Federal Bureau of Investigation as she testified [R. T. 446, 453-455]. On the contrary since she was trying to impress Courtney with the fact that she had committed herself too far to be able to turn around, recant her story, and lie about her prostitution activities, it is quite logical she would inform him about the federal investigation.

The few examples offered by appellant drawn from the witness' lengthy testimony serve adequately the lack of substance in his argument.

## F

### THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANTS' MOTION FOR A CONTINUANCE.

---

On September 10, 1965, the Court heard appellant's motion for a continuance of a jury trial because of Courtney's injury. Three doctors testified.

Dr. Edwin Plimpton, an orthopedic surgeon, had examined Courtney at the Government's request [R. T. A-44]. Dr. Plimpton could find no condition which would prevent Courtney's appearance if sedation to control his discomfort were given [R. T. A-46]. The examination revealed no distress in movement or restriction of





Courtney's physical activity [R. T. A-47]. Test of movement could reveal only a general soreness in the lower back, and Dr. Plimpton admitted this was a subjective determination because it depended solely on appellant's claim of tenderness [R. T. A-49 - A-50].

Courtney was found to be alert and cooperative [R. T. A-45].

The next witness was Dr. Charles Hutter, an orthopedic surgeon. He was an associate of Dr. Gentile, Courtney's doctor, and testified from Dr. Gentile's records [R. T. A-59]. After reading the record of Courtney's condition, Dr. Hutter declared he was aware of nothing that would lead him to believe that appellant could not stand trial [R. T. A-66]. His condition was not an urgent matter [R. T. A-68]. Pain medication would make appellant able to do routine business activities and to get around until his surgery [R. T. A-66 - A-67]. This medication would not cloud the average person's mind or understanding or force Courtney to stop business or mental activities [R. T. A-67, 69, 70].

The last to testify was Dr. William Bryan, Jr., a surgeon and specialist in hypnosis (despite not having completed a residency in psychiatry) [R. T. 77-79], who was familiar with the drugs that Courtney took to alleviate the distress. Dr. Bryan stated that the medication would have some effect on the mental processes because it was oral, but that the effect would vary according to the particular individual's reaction and depend on his body weight [R. T. A-74]. Though he had never examined appellant, Dr. Bryan believed the medication would cause some impairment of Courtney's judgment [R. T. A-76 - A-77].



The Court denied the appellant's motion because the evidence presented was not sufficient to convince the judge that any prejudice to Courtney would occur if he stood trial the next week [R. T. A-88].

Courtney could not show facts which supported his claim of being under the influence of medication at that time to justify a continuance and the court had sufficient information from the physicians' testimony to support the denial of the continuance. France v. United States, 358 F.2d 946, 948 (10th Cir. 1966). Mere discomfort or incapacity is not sufficient grounds for granting the continuance. "There must exist at the time of trial a lack of understanding which prevents defendant from appreciating the nature of the proceeding and renders him unable to aid in his own defense." Smith v. United States, 267 F.2d 210, 211 (9th Cir. 1959).

The court determined that Courtney had sufficient ability to consult with his attorney with a reasonable degree of rational understanding, and he had a rational as well as factual understanding of the proceeding. United States v. Dusky, 362 U.S. 402 (1959); Pate v. Robinson, 383 U.S. 375, 15 L. Ed.2d 815 (1965).

The pain from the claimed injury and the effect of the pain medication were carefully examined by the Court at this time and throughout the trial so that appellant was not deprived of a fair trial. Hanford v. United States, 365 U.S. 920 (D.C. 1966).

In Judge Hill's chambers, the morning before the trial, the court again heard the appellant's claim of inability to stand trial. After an extensive discussion of the problem, Dr. Sidney



Cohen was asked to examine Courtney [R. T. 13].

Dr. Cohen determined that while it was very likely that Courtney was in pain, he could still understand the procedures of the trial [R. T. 23]. Courtney was sufficiently oriented and unimpaired in his mental ability to both understand the nature of the proceeding and cooperate with his counsel in his own defense [R. T. 26].

He knows exactly who he is, where he is, what the purpose of his being here is and so forth. His memory and recall are excellent. He remembers both ancient matters concerning himself, and recent; and can give fairly good dates concerning these items. [R. T. 21].

Appellant was only in moderate pain, and if greater pain developed, a recess could be called and medication given to relieve the distress without causing impairment to Courtney's ability to function mentally [R. T. 29].

It should be noted that no recess was ever requested by Courtney.

The drugs used by Courtney at their present dosage would not impair his ability to concentrate over a period of time, but an overdose could make him unable to concentrate or cooperate [R. T. 29].

Courtney had previously told the court that morning that he was taking the medication more frequently than instructed by Dr. Gentile [R. T. 9].





The court after discussion of the question with both counsel decided to revoke bail and place Courtney into hospital custody. This action was a necessary exercise of the court's discretionary power because further injury to appellant or a voluntary overdose of medication could have made a fair trial impossible. Though the court took serious action, such action was necessary under the circumstances of this case.

The court may revoke a defendant's bail during a trial if it is necessary under the circumstance for the orderly process of the trial and does not constitute an arbitrary or capricious action. Fernandez v. United States, 5 L. Ed. 2d 683, 686, 687 (1961).

Once the trial has begun, the public interest becomes more pressing and conduct in or out of the court room which causes a danger to the trial may create power to remand defendant to custody during the trial. United States v. Bentvena, 288 F. 2d 442 (2nd Cir. 1961). It is a question of sound discretion by the trial court. The trial court used its discretionary power reasonably under the extreme circumstance based on the justifiable fear that Courtney might cause self-induced incapacity by taking an overdose. Carbo v. United States, 7 L. Ed. 2d 769 (1962). See also Pouncey v. United States, 349 F. 2d 699 (D.C. Cir. 1965).

Because the appellant could not be admitted to the County General Hospital, he was taken to the hospital section of the Central County Jail [R. T. 89]. He could not be given his usual medication the first night because of usual jail procedure. Non-narcotic substitutes were given to the appellant but this was only on the



first day of trial when the jury was impaneled, counsel made their introductory statements and the first witness testified [R. T. 93].

The court immediately established procedure with the County Jail so that Courtney could receive any medication his doctor wished him to have [R. T. 100]. The following day, the second day of trial, the appellant was placed in St. Vincent's Hospital with adequate official protection [R. T. 241].

The court used every means possible to insure Courtney reasonable comfort while protecting the regularity of the trial. For example, the court informed Courtney that he could use a bed or wheelchair during the trial if he wished and that a recess would be called if he needed it for his health [R. T. 7]. Courtney did not use either of these offers nor did he express a need for them during the trial.

The only question of Courtney's health during the trial was raised by his counsel concerning Courtney's supposedly faltering voice [R. T. 791-792]. Since neither Courtney [R. T. 791] nor the court [R. T. 793] could detect any defect in his voice and since Courtney's only complaint was that he was nervous [R. T. 791] (a hardly remarkable statement for a defendant in trial on serious charges), the court properly refused a defense request that the jury take into account the fact that Courtney was taking drugs in considering his demeanor on the stand [R. T. 793, 798]. Such an instruction would not have been supported by the evidence before the jury.

Certainly the most critical evidence to consider in



determining whether or not the record shows the appellant might have been prejudiced by any of the various ruling of the trial court concerning this health issue is the appellant's own testimony. An examination of this testimony establishes that the appellant was a most able witness in his own behalf. He underwent lengthy direct examination, stood up well to forceful cross examination, and at no time showed any lack of understanding of the situation or lack of memory of any essential facts.

Even if, therefore, it could be concluded that the court violated its discretion in revoking bail, this action did not interfere with the basic fairness of the trial or cause any prejudice to appellant.

This case is not a direct appeal from revocation of bail as in Carbo v. United States, supra and Fernandez v. United States, supra. The trial was completed and any harmless error which may have been made, should be viewed in the context of the total trial and its effect on the jury.

G.

THE TRIAL COURT DID NOT DISPLAY BIAS  
AGAINST THE APPELLANT.

---

None of the examples of alleged bias by the court which appellant's brief mentions, revealed bias or prejudice by the trial judge against the appellant. When carefully analyzed within the context of the total trial, the record reveals that the appellant was





tried before a patient and fair court.

1. Appellant attacks the trial court for its concern over the possibility of Courtney taking an overdose of the drugs prescribed for his pain. Since Courtney himself admitted in chambers that he had taken more medication than prescribed by his doctor, the bad effects of which were mentioned by his own counsel [R. T. 5] and since Dr. Cohen stated that an overdose would make Courtney unable to concentrate and cooperate during the trial [R. T. 29], the concern of the court was fully justified.

2. In his brief, appellant gives a less than complete picture of the circumstances surrounding the unavailability of witness Stevenson who had testified in the first trial. When defense counsel raised the question of unavailability, the court granted time to government counsel to investigate the condition of Miss Stevenson. Defense counsel had no objection to this because her testimony could come as well at the end of the trial [R. T. 1044-1045]. When defense counsel later asked if he could put on the prior testimony of Miss Stevenson, the court asked if there were any objections. Government counsel mentioned there should be a showing of unavailability as to her testimony [R. T. 1071-1072]. When the court questioned counsel for the defense, he was unable to give the court definite information as to the condition of Miss Stevenson. Therefore, the court was forced to ask government counsel to verify the matter [R. T. 1072]. When he could not, the court called a recess and settled the problem outside the presence of the jury [R. T. 1073-1074]. Despite government counsel's



objection to the reading into the record of her testimony from the first trial, the court granted Mr. Stanley's request [R. T. 1074]. These events do not show bias by the court, but on the contrary show the court weighing both sides' positions and deciding for the appellant.

3. Government counsel asked Courtney whether he would not be more successful in his professional dancing activities if he used only one name. Courtney replied that a well-known actor, Kookie Byrnes, changed his name four times in two months. The court asked appellant to just answer the questions because they had been into many irrelevant issues. When Courtney balked at this; the court again explained its procedure on questioning to Courtney [R. T. 1015]. This was merely an attempt to control the order and progress of the trial, not an example of bias and prejudice. The procedure to be followed for cross examination is within the discretion of the trial court. Storm v. United States, 94 U.S. 76, 85, 24 L.Ed. 42 (1876).

4. Appellant alleges that the court improperly denied defense counsel a continuance to obtain the presence of the manager of the Poinsettia Apartment, who, it was represented, would rebut Kathy O'Brien's testimony concerning "living with" Courtney. It is also claimed that defense counsel made a showing of due diligence in attempting to serve this witness.

The record reveals a very different picture from that represented by appellant's brief. The day after O'Brien's testimony, trial defense counsel first informed the court he had subpoenaed the



witness, then stated he was trying to subpoena the witness but that no one was available to serve the subpoena. He expressed doubt as to whether or not he would be successful in obtaining service [R. T. 1216-1217].

The court interpreted this rambling statement by counsel as being a request for a continuance and stated in effect that the view of this lack of showing of diligence, the defense would be deemed to have rested if it ran out of witnesses [R. T. 1217].

At that point the court rested for lunch [R. T. 1217].

Immediately after lunch the court denied a government's request to reopen to present further material rebutting Gutman's (the parole officer) testimony since the government had not shown due diligence. This ruling is another example of impartiality on the part of the court [R. T. 1221-1222].

The defense later produced Myrna Neil who testified that Kathy O'Brien had lived with a girl named Joan at the Poinsettia Apartment and that there had not been room for anyone else [R. T. 1235, 1246].

When defense counsel next raised the question of the apartment manager, he stated that he had sent a person to the apartment to serve the subpoena, but that the manager had not been located. The court then again denied a continuance [R. T. 1255-1257]. In view of the fact that the offered testimony would be basically cumulative in the light of Neil's testimony mentioned above, this ruling was well within the discretion of the court. Ten pages further on in the transcript the court again inquired of





defense counsel whether he had any further witnesses. When defense counsel made no further mention of the apartment manager and merely stated "Nothing further, your Honor", the court declared both sides to have rested [R. T. 1267].

This proper action by the court in expediting a lengthy trial constitutes a reasonable action by the court and cannot be considered part of a plan by a biased judge to deprive a defendant of his rights. The record reveals that the court allowed the defense full opportunity to put on its case.

5. Appellant claims that the trial court's rulings on the scope of cross examination proves that the court was biased in favor of the prosecution. He presents examples which are claimed to prove that defense counsel was unduly restricted in cross examination of Hoskins while government counsel enjoyed the full scope of cross examination of both defendants on similar subjects.

Defense counsel's cross examination of Mrs. Hoskins on her present employment and her income tax was limited by the court because it was irrelevant and beyond the scope of cross examination [R. T. 471, 477-478].

In contrast, government counsel's questions on cross examination of Kornhaber concerning his present employment were based on Kornhaber's testimony on direct concerning his employment background [R. T. 647, 613-614]. The answers helped clarify confusion left by the defense counsel's examination as to Kornhaber's employment at the time of the trial.

Questions asked of appellant on cross examination about his



income tax arose directly from Courtney's statements about his earnings and were used by government counsel to impeach Courtney's testimony [R. T. 1016-1017].

The problems raised in cross-examination of Hoskins, Kornhaber and Courtney were distinct and required different, distinct and appropriate rulings. The trial court has liberal discretion in determining latitude to be given on cross examination of witnesses. Bass v. United States, 326 F.2d 884, 890 (8th Cir. 1964); Twachtman v. Connelly, 106 F.2d 501 (6th Cir. 1939).

6. The claimed bias in the court's giving of contemporaneous limiting instructions is completely unfounded. There are many instances of prompt instructions by the court to limit government counsel's questions, especially in the cross examination of Courtney in regard to his income tax returns [R. T. 969, 1017]. The court showed a conscientious effort to protect the appellant throughout the trial.

7. Within a series of legal presumptions, the court stated: "The law presumes that official duty, including the duties and functions of police officers and of F. B. I. agents and other law enforcement officers . . . that official duty has been regularly performed." [R. T. 1439]. This was not unusual or confusing, especially in the middle of instructions on other legal presumptions. This could not have created a prejudice in the jury in favor of the F. B. I. or police, especially after the lengthy instructions given to the jury on the consideration of testimony [R. T. 1435-1437]. It is the responsibility of the trial court to determine the language of the



instructions to the jury. Cohen v. Evening Star Newspaper Co., 113 F.2d 523 (D.C. Cir. 1940). The court carried out this responsibility with utmost care and without any prejudice.

8. While the appellant claims that the court showed unexplained hostility towards trial defense counsel, the record only shows that the court expressed displeasure in that on one occasion counsel was late to court [R. T. A-13], and on a second occasion failed to appear because of an appearance in state court [R. T. 1517-1518]. On neither occasion did the court use any abusive language. On the second occasion, the court granted the continuance requested by the defense [R. T. 1525]. Since a federal judge has the duty of and right to maintain control of his court room and since in no possible way could the defendant have been prejudiced by these actions of the court, the claimed error is without merit. In Re Osborne, 344 F.2d 611 (9th Cir. 1965).

9. The brief of appellant's counsel makes many unfounded assertions as to the incorrectness of the court's order denying appellant's in forma pauperis motion. But the order does not contain misstatements, but logical interpretations of the testimony and findings of the jury.

a. The order states, "Defendant's own doctor testified at the hearing on the motion for continuance that he was entirely competent physically and mentally to stand trial and did in his own defense." (Appellant's Brief, Appendix B).

Dr. Hutler, who was an associate of Dr.





Gentile, who examined Courtney, could be referred to as Courtney's doctor [R. T. A-59-63]. Dr.

Hutler stated that he was aware of nothing that would lead him to believe that Mr. Courtney could not stand trial [R. T. A-66].

b. The order states, "A physician for the Government . . . found that he (Courtney) was not under the influence of any drugs" (Appellant's Brief, Appendix B).

Dr. Cohen stated that the drugs did not adversely affect Courtney mentally [R. T. 23]. There is only a difference in phraseology, not meaning between this and the statement in the order.

c. The order states that Dr. Cohen found the defendant "totally competent" (Appellant's Brief, Appendix B).

Dr. Cohen answered in the affirmative to the court's question, "Is it then, in summary, your opinion that you feel that this defendant is sufficiently oriented, sufficiently unimpaired in mental ability, both to understand the nature of the proceedings, and to cooperate with his counsel in his own defense?" [R. T. 26-27]. From this statement, it is a perfectly logical conclusion that Courtney was "totally competent to stand trial".

d. The order states that there was "no



contention at any time during the actual trial that the defendant was under the influence of any drugs" (Appellant's Brief, Appendix B).

No actual contention that Courtney was under drugs was made during the trial. Mr. Stanley raised the question that Courtney's speech was effected by drugs but the court could not find any lack of clarity in appellant's speech [R. T. 793]. During the trial no actual contention was made that appellant was under the influence of drugs.

e. The order states, "Testimony . . . revealed that the defendant had derived substantial money from at least three prostitutes . . . ." (Appellant's Brief, Appendix B).

Appellant received money from three prostitutes, Loretta Hoskins, Beverly Caputo and Kathy O'Brien [R. T. 349-351, 1122].

The contents of the order denying the motion do not, therefore, show bias or prejudice on the part of the trial judge. Though appellant may interpret the evidence differently, the court's statements are logical conclusions based on the testimony throughout the entire trial.

During the trial, Judge Hill showed no bias or prejudice. The trial court must be free from unfounded, unreasonable attack so that all parties may receive justice.

"It is one of the glories of federal criminal



law administration that a district judge is more than a moderator or umpire and has an active responsibility to see that a criminal trial is fairly conducted."

United States v. Curcio, 279 F.2d 681 at 682  
(2nd Cir. 1960).

V

CONCLUSION

For the reasons stated the Judgment of the District Court should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,  
United States Attorney,

ROBERT L. BROSIO,  
Assistant U. S. Attorney,  
Chief, Criminal Division,

Attorneys for Appellee,  
United States of America.





## CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Robert L. Brosio  
ROBERT L. BROSIO



IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

*See Vol.  
3388*

SAYRE & COMPANY, LTD.,  
Appellant

v.

A.G. MADDOX, Commissioner of  
Revenue and Taxation,  
Appellee

ON APPEAL FROM THE JUDGMENT OF THE  
DISTRICT COURT OF GUAM

BRIEF FOR THE APPELLEE ON REHEARING, AND FOR  
THE UNITED STATES AND THE GOVERNMENT OF GUAM  
AS AMICI CURIAE

HAROLD W. BURNETT,  
Attorney General, Government of Guam,  
Agana, Guam 96910.

MITCHELL ROGOVIN,  
Assistant Attorney General.

LEE A. JACKSON,  
HAROLD C. WILKENFELD,  
J. EDWARD SHILLINGBURG,  
Attorneys,  
Department of Justice,  
Washington, D.C. 20530.

FILED

APR 1 1968

WM. B. LUCK, CLERK



Prior Opinions-----	1
Jurisdiction-----	2
Question Presented-----	3
Statutes and Regulations Involved-----	3
Statement-----	3
Summary of Argument-----	6
Argument:	
A corporation organized in the United States is a "foreign" corporation for the purposes of the Guam Territorial income tax-----	9
A. Introduction-----	9
B. The rationale of the <u>Atkins Kroll</u> case has no application to this case-----	14
C. The <u>Atkins Kroll</u> case was wrongly decided-----	23
1. Scheme of the 1954 Code-----	24
2. Conversion of the 1954 Code into the Guam Territorial income tax law-----	26
D. In the alternative, the taxpayer is taxable on world-wide income under Section 11-----	35
Conclusion-----	36
Appendix-----	38

CITATIONS

Cases:

<u>Atkins Kroll (Guam) Ltd. v. Government of Guam,</u> 367 F. 2d 127, certiorari denied, 386 U.S. 993-----	1
<u>Continental Trading, Inc. v. Commissioner,</u> 365 F. 2d 40, certiorari denied, 361 U.S. 827-----	18
<u>Government of Guam v. Koster,</u> 362 F. 2d 248-----	20, 36
<u>Jennings v. United States,</u> 168 F. Supp. 781, vacating opinion, 155 F. Supp. 571-----	9
<u>Leguana v. Ansell,</u> 102 F. Supp. 919 (Guam), affirmed per curiam, 212 F. 2d 207, certiorari denied, 348 U.S. 830-----	9, 10, 18





<u>Moline Properties, Inc. v. Commissioner</u> , 319	
U.S. 435	34
<u>National Carbide Corn. v. Commissioner</u> , 336	
U.S. 422	34
<u>National Paper Co. v. Powers</u> , 266 U.S. 373	24, 36
<u>Sayre &amp; Co. v. Madison</u> , 370 F. 2d 372	1

## Statutes:

Act of March 4, 1927, c. 503, 44 Stat. 1181,

Sec. 1

21

Internal Revenue Code of 1954:

Sec. 1 (26 U.S.C. 1964 ed., Sec. 1)	17, 26, 30
Sec. 11 (26 U.S.C. 1964 ed., Sec. 11)	17, 24, 27, 28, 30, 35, 38
Sec. 48 (26 U.S.C. 1964 ed., Sec. 48)	21
Sec. 61 (26 U.S.C. 1964 ed., Sec. 61)	24
Sec. 162 (26 U.S.C. 1964 ed., Sec. 162)	16
Sec. 163 (26 U.S.C. 1964 ed., Sec. 163)	16
Sec. 243 (26 U.S.C. 1964 ed., Sec. 243)	32
Sec. 245 (26 U.S.C. 1964 ed., Sec. 245)	32
Sec. 301 (26 U.S.C. 1964 ed., Sec. 301)	32
Sec. 367 (26 U.S.C. 1964 ed., Sec. 367)	32
Sec. 861 (26 U.S.C. 1964 ed., Sec. 861)	11, 17
Sec. 862 (26 U.S.C. 1964 ed., Sec. 862)	11
Sec. 871 (26 U.S.C. 1964 ed., Sec. 871)	17, 29, 31
Sec. 881 (26 U.S.C. 1964 ed., Sec. 881)	4, 10, 24, 35, 38
Sec. 882 (26 U.S.C. 1964 ed., Sec. 882)	13, 24, 38
Sec. 901 (26 U.S.C. 1964 ed., Sec. 901)	16, 20, 29, 39
Sec. 902 (26 U.S.C. 1964 ed., Sec. 902)	16, 29, 32, 33, 40
Sec. 904 (26 U.S.C. 1964 ed., Sec. 904)	16, 40
Sec. 931 (26 U.S.C. 1964 ed., Sec. 931)	48
Sec. 932 (26 U.S.C. 1964 ed., Sec. 932)	12, 17
Sec. 934 (26 U.S.C. 1964 ed., Sec. 934)	21
Secs. 951-964 (26 U.S.C. 1964 ed., Secs. 951-964)	32
Sec. 955 (26 U.S.C. 1964 ed., Sec. 955)	21
Secs. 1246-1248 (26 U.S.C. 1964 ed., Secs. 1246-1248)	32
Sec. 1442 (26 U.S.C. 1964 ed., Sec. 1442)	11, 40
Sec. 1461 (26 U.S.C. 1964 ed., Sec. 1461)	11, 40
Sec. 1462 (26 U.S.C. 1964 ed., Sec. 1462)	11, 40
Sec. 1504 (26 U.S.C. 1964 ed., Sec. 1504)	32
Sec. 7701 (26 U.S.C. 1964 ed., Sec. 7701)	11, 15, 26, 41



13 Laws of Puerto Rico Annotated (1966 Cum. Pocket Supp.), Secs. 252, 252a, 252b-----	11
Organic Act of Guam, c. 512, 64 Stat. 384:	
Sec. 3 (48 U.S.C. 1964 ed., Sec. 1421a)-----	12
Sec. 31 (48 U.S.C. 1964 ed., Sec. 1421i)-----	4, 9, 10, 26, 27, 42
Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 261----	21
Tax Law, 59 McKinney's Consolidated Laws of New York Annotated, c. 60, Secs. 208-210-----	28
33 Virgin Islands Code Annotated (1966 Cum. Pocket Part), Secs. 4041, 4061, 4071-----	21

### Miscellaneous:

Administrative Code of New York City, Title R, City Business Tax, Secs. R. 46-3.0, R. 46-4.0, R. 46-20.0, as enacted by L.L. 21, Laws 1966 (CCH New York Tax Reporter, pars. 193-306a, 193-307b, 193-346a)-----	28
4 CCH Standard Federal Tax Reporter (1968), par. 4206.05-----	28
96 Cong. Record:	
Part 6, p. 7577-----	9, 19
Part 8, p. 11082-----	10
Executive Order No. 11,071, 27 Fed. Register 12875 (1962)-----	21
H. Rep. No. 1131, 86th Cong., 1st Sess., pp. 3-6 (1960-2 Cum. Bull. 811, 812-815)-----	21
H. Rep. No. 1677, 81st Cong., 2d Sess., p. 12-----	12
H. Rep. No. 2475, 74th Cong., 2d Sess., pp. 9-10 (1939-1 Cum. Bull. (Part 2) 667, 673-674)-----	11
I. T. 2946, XIV-2 Cum. Bull. 109-----	17, 31
I. T. 4046, 1951-1 Cum. Bull. 57-----	9
8 Mertens, Law of Federal Income Taxation (1964 rev.), c. 45-----	11
Paul and Mertens, Law of Federal Income Taxation (1939 Cum. Supp.), Secs. 37.15A, 37.15B-----	11
Radler, Corporate Taxation in the Common Mar- ket, II Guides to European Taxation (International Bureau of Fiscal Documen- tation, Amsterdam, 1964), pp. II-A:1-II-A:11, II-D:6-II-D:7-----	30



Page

Rev. Rul. 56, 1953-1 Cum. Bull. 303-----	17
Rev. Rul. 56-616, 1956-2 Cum. Bull. 569-----	12, 17
Roberts and Warren, U.S. Income Taxation of Foreign Corporations and Nonresident Aliens (Practicing Law Institute 1966)-----	11
S. Rep. No. 2156, 74th Cong., 2d Sess., pp. 21-23 (1939-1 Cum. Bull. (Part 2) 678, 691-693)-----	11
Treasury Regulations on Income Tax (1954 Code):	
Sec. 1.882-3 (26 C.F.R., Sec. 1.882-3)-----	11, 44
Sec. 1.901-2 (26 C.F.R., Sec. 1.882-3)-----	12
Sec. 1.911-1 (26 C.F.R., Sec. 1.911-1)-----	12
Sec. 1.931-1 (26 C.F.R., Sec. 1.931-1)-----	12
Sec. 1.932-1 (26 C.F.R., Sec. 1.932-1)-----	17
Sec. 1.957-3 (26 C.F.R., Sec. 1.957-3)-----	12
Treasury Regulations on Procedure and Administra- tion, Sec. 301.7701-5-----	11, 44





IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

No. 20,771

SAYRE & COMPANY, LTD.,  
Appellant

v.

A.G. MADDOX, Commissioner of  
Revenue and Taxation,  
Appellee

---

ON APPEAL FROM THE JUDGMENT OF THE  
DISTRICT COURT OF GUAM

---

BRIEF FOR THE APPELLEE ON REHEARING, AND FOR  
THE UNITED STATES AND THE GOVERNMENT OF GUAM  
AS AMICI CURIAE

---

This joint brief is filed in response to the Court's order of February 2, 1968. The United States, and the Government of Guam as a party in Atkins-Kroll (Guam) Ltd. v. Government of Guam, 367 F. 2d 127, certiorari denied, 386 U.S. 993, join, as amici curiae, in this brief for the appellee.

PRIOR OPINIONS

The memorandum findings of fact and conclusions of law (I-R. 27-29) <sup>1/</sup> of the District Court are not officially reported. This Court's opinion is reported at 378 F. 2d 372.

---

1/ "I-R." references are to Volume I of the Record on Appeal.



## JURISDICTION

This appeal involves Guam Territorial income taxes for the taxable years ending November 30, 1955, November 30, 1956, and November 30, 1957. On April 2, 1965, the Commissioner of Revenue and Taxation advised the taxpayer of deficiencies in tax for those years in the aggregate amount of \$6,137.04. (I-R. 1, 29.) The taxpayer filed a petition with the District Court for a redetermination of those deficiencies on August 30, 1965. (I-R. 1-5.) The judgment of the District Court was entered on December 6, 1965. (I-R. 30.)

The case was brought to this Court by a notice of appeal filed December 28, 1965. (I-R. 32.) Both parties filed briefs and presented oral arguments before Circuit Judges Browning and Duniway, and District Judge Tavares. Pursuant to the Court's per curiam opinion of May 5, 1967, the District Court's judgment was reversed on the basis of Atkins-Kroll (Guam) Ltd. v. Government of Guam, supra. Thereafter, the Commissioner filed a petition for rehearing en banc. On July 31, 1967, the Court asked the taxpayer to respond to one of the Commissioner's contentions, i.e., that, assuming the Atkins-Kroll case to be correct on its facts, it is distinguishable from the instant case. The taxpayer filed an opposition to the petition, and the Commissioner thereafter filed a response. On February 2, 1968, the Court granted the petition for rehearing, ordered the appeal to be heard en banc, provided for the filing of supplemental briefs, and invited the



United States and the parties in the Atkins-Kroll case to file briefs. The order noted that the briefs were to consider whether the Atkins-Kroll case was rightly decided and whether the instant case is distinguishable. Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

#### QUESTION PRESENTED

The Guam Territorial income tax law imposes a tax of 30 percent on dividends, interest, compensation, and other types of income received by a "foreign" corporation from sources in Guam. The question presented is whether a corporation incorporated in Hawaii is "foreign" and thus subject to this tax.

#### STATUTES AND REGULATIONS INVOLVED

The statutes and Regulations involved are set out in the Appendix, infra.

#### STATEMENT

The pertinent facts are briefly restated for the convenience of the Court. The taxpayer is a Hawaii corporation not engaged in trade or business in Guam. All of its capital stock (except qualifying shares) is owned by John L. Sayre. Prior to 1955, the taxpayer actively engaged in the sale of household appliances in Hawaii under exclusive franchise agreements. In 1954 John Sayre moved to Guam and engaged in the business of selling appliances at retail as Kirby and Company, a sole proprietorship. The taxpayer obtained additional





exclusive franchises for the sale of appliances, permitted John Sayre to sell appliances in Guam under its franchises, and charged him a commission. The taxpayer also loaned John Sayre money and equipment to enable him to begin business in Guam. The taxpayer's activities in Hawaii have declined as John Sayre promoted the Guam business of Kirby and Company. (I-R. 27-28.)

During the taxable years here in question, John Sayre paid the following amounts to the taxpayer (I-R. 28):

<u>Year</u>	<u>Interest</u>	<u>Commissions</u>	<u>Total</u>
1955	\$2,000.13	\$4,560.00 <sup>2/</sup>	\$6,560.13
1956	2,321.19	4,450.94	6,772.13
1957	2,437.25	4,687.28	<u>7,124.53</u>
		Total:	\$20,456.79

The Commissioner determined that these amounts were taxable by Guam under Section 881, Internal Revenue Code of 1954, as made applicable to Guam by Section 31, Organic Act of Guam, c. 512, 64 Stat. 384 (48 U.S.C., Sec. 1421i). Accordingly, he asserted deficiencies in tax against the taxpayer aggregating \$6,137.04 -- i.e., 30 percent of the total payments made, \$20,456.79. (I-R. 1, 7, 29.) The taxpayers petitioned the District Court for a redetermination (I-R. 1-4) and the court sustained the Commissioner (I-R. 29, 30).

2/ Through inadvertence, the District Court's findings of fact reflect this amount as \$4,516. See I-R. 2.



The taxpayer appealed to this Court, contending (1) that Guam's tax laws could not be given extra-territorial effect; (2) that Guam could not impose a gross tax of 30 percent under Section 881 because the taxpayer was not a "foreign" corporation under the Atkins Kroll case and because no provision was made for business expense deductions; and (3) that the tax violated the Fifth Amendment due process and commerce clauses of the Constitution of the United States.

In answer, the Commissioner contended (1) that Guam had jurisdiction to tax the amounts in question because they were derived from Guam sources; (2) that the taxpayer was a "foreign" corporation within the meaning of Section 881 and that the statute and the interpretative Treasury Regulations expressly made no provision for the allowance of deductions; and (3) that the tax was constitutional.

The panel of this Court handed down a per curiam opinion on May 5, 1967, reversing the judgment of the District Court "on the authority of" the Atkins-Kroll decision. 378 F. 2d 372. The Court's order of February 2, 1968, granting the Commissioner's petition for rehearing, noted that the supplemental briefs were to consider both the correctness of the Atkins-Kroll decision and its applicability to the instant case.



## SUMMARY OF ARGUMENT

In the Organic Act of Guam Congress made the Internal Revenue Code applicable to Guam as a "mirror" income tax. The Code levies a separate Guam Territorial income tax but the provisions and rates are the same as for the United States income tax. The tax is administered and enforced and its proceeds expended by the Government of Guam, not by the Internal Revenue Service and Congress. As applied to Guam, Section 881 of the Code levies, in lieu of the regular 50 percent net corporate income tax imposed by Section 11, a 30 percent tax on the gross amount of certain items of income, such as dividends, interest, and compensation, received from sources in Guam by foreign corporations not engaged in business in Guam. Guam is a possession and thus its corporations are "foreign" for United States tax purposes; under the "mirror" theory, United States corporations are "foreign" for Guam tax purposes.

In this case the District Court sustained a deficiency in tax determined by the Commissioner under Section 881 with respect to interest and commissions received from sources in Guam by the taxpayer, a Hawaii corporation, which was not engaged in business in Guam. In a recent case, a panel of this Court held that a California corporation not engaged in business in Guam was not a "foreign" corporation for the purposes of Guam's Section 881 and consequently was not subject to the 30 percent tax on a dividend which it received from its Guam subsidiary. Atkins Kroll (Guam) Ltd. v. Government of Guam. In the instant case,





- 1 -

a panel of this Court reversed the judgment of the District Court "on the authority" of the Atkins Kroll decision.

We submit that the judgment of the District Court should be affirmed.

1. Assuming the Atkins Kroll case to have been correctly decided, its rationale is not applicable to the instant case. The basis of that decision was the Court's judgment that Congress could not have intended that Guam impose two taxes on corporate earnings -- once when they are earned by the Guam corporation and once when the after-tax earnings are paid to the California corporation as a dividend. The instant case involves interest and commissions which, unlike dividends, are deductible in computing the Guam payor's income tax and are subject only to the 30 percent Section 881 tax in the hands of their recipient. Thus the rationale of Atkins Kroll -- avoidance of multiple taxation of corporate earnings -- has no application here. Indeed, if the result in Atkins Kroll is applied to the instant case, amounts such as interest and commissions will go free of any Guam tax. Congress, in establishing the Guam income tax law, clearly intended that the Government of Guam should be independent of annual appropriations from the federal treasury and should support itself from its own resources.

2. The Atkins Kroll decision was wrongly decided. It is contrary to two basic premises on which Guam's tax is based: (1) That the Internal Revenue Code views corporations and their shareholders as



separate taxable entities and taxes corporate earnings twice, once when they are earned by the corporation and once when the after-tax earnings are paid to their shareholders as dividends; and (2) the United States and Guam are separate and distinct taxing jurisdictions, so that Guam corporations are "foreign" for purposes of the United States income tax and United States corporations are "foreign" for purposes of Guam tax. Whether a corporation is "foreign" or "domestic" is basic to Guam's entire tax system, and consideration of the status of U. S. corporations section by section of the Code produces an endless chain of administrative problems.

3. In the alternative, if Section 881 is not applicable to United States corporations because they are "domestic" corporations for Guam tax purposes, then they are subject to tax in Guam on their world-wide income under Section 11 of the 1954 Code, as are other domestic Guam Corporations (i.e., those incorporated under the laws of Guam). Section 881 expressly states that the tax which it imposes is "in lieu of the taxes imposed" by Section 11. Thus, corporations such as the taxpayer are subject to tax in both the United States and Guam on their world-wide incomes. Indeed, the logical consequence of the Atkins-Kroll decision is that each and every United States corporation is subject to tax in Guam on its world-wide income whether or not it derives income from sources within Guam. This result is contrary to the policy which Congress announced in Section 881, but it appears to be compelled by the Atkins Kroll decision.



ARGUMENT

A CORPORATION ORGANIZED IN THE UNITED STATES IS  
A "FOREIGN" CORPORATION FOR THE PURPOSES OF THE  
GUAM TERRITORIAL INCOME TAX

A. Introduction

The issue presented by this case is whether Sayre & Company, Ltd., a corporation organized under the laws of Hawaii, is subject to Guam Territorial income tax on interest and commissions received from Guam sources. Guam has a "mirror" income tax, that is, the income tax laws (including the rates of tax) in force in the United States from time to time constitute the income tax laws of Guam and impose a separate tax payable to the Government of Guam. <sup>3/</sup> Congress adopted the income tax laws of the United States as a "mirror" tax applicable to Guam with the intent that the Government of Guam should be independent of annual Congressional appropriations from the federal treasury and raise revenue from its own sources to carry out its governmental concerns. <sup>4/</sup>

<sup>3/</sup> Section 31(a) and (b), Organic Act of Guam, as amended in 1958, Appendix, infra. Although the 1958 amendment clarified the Guam law, it is both declaratory of the preexisting law and retroactive. See Section 31(d)(1), Organic Act of Guam, Appendix, infra; Laguana v. Ansell, 102 F. Supp. 919 (Guam), affirmed per curiam, 212 F. 2d 207 (C.A. 9th), certiorari denied, 348 U.S. 830; Jennings v. United States, 168 F. Supp. 781 (Ct. Cl.), vacating opinion, 155 F. Supp. 571; I.T. 4046, 1951-1 Cum. Bull. 57.

<sup>4/</sup> On the floor of the House of Representatives Representative Scrivner asked with respect to the proposed amendment which subsequently was enacted as Section 31 of the Organic Act (96 Cong. Record, Part 6, p. 7577):

\* \* \* I am to understand that there is sufficient property, there are sufficient sources of revenue right there on the island of Guam so that they

(Continued.)





Congress dealt with the problem of modifying the Internal Revenue Code to levy the Guam Territorial income tax by providing in Section 31(e) of the Organic Act, Appendix, infra, that --

except where it is manifestly otherwise required, the applicable provisions of the Internal Revenue Codes of 1954 and 1939, shall be read so as to substitute "Guam" for "United States" \* \* \* and with other changes in \* \* \* language, including the omission of inapplicable language, where necessary to effect the intent of this section.

For United States income tax purposes, Section 881 of the Internal Revenue Code of 1954, Appendix, infra, imposes a 30 percent tax on certain types of income (e.g., dividends, interest, compensation) received by foreign corporations from sources in the United States. Section 881(a) states --

In the case of every foreign corporation not engaged in trade or business within the United States, there is hereby imposed for each taxable year, in lieu of the taxes imposed by section 11 [which imposes the tax on corporate net income], a tax of 30 percent of the amount received from sources within the United States as interest \* \* \*, dividends, \* \* \*, compensations, \* \* \* or other fixed or determinable annual or periodical gains, profits, and income \* \* \* .

---

(Footnote 4 , continued.)

will be able to set up a tax structure sufficient to carry their own expenses of government without asking for any contribution from the United States to help carry their government cost?

Representative Miller, the proponent of the amendment and Representative Peterson, Chairman of the Committee on Public Lands, replied that this was their understanding. The debate on the point was set out in more detail by the District Court in Laguana v. Ansell, supra (102 F. Supp. 920-921). The Senate concurred. 96 Cong. Record, Part 8, p. 11082.



The tax is levied on the gross amount received; to obviate administrative problems no offsetting deductions are permitted. <sup>5/</sup> This tax is to be withheld and remitted to the Federal Government by the United States payor of the income. Sections 1442, 1461, and 1462 of the Internal Revenue Code of 1954, Appendix, <sup>6/</sup> infra.

A "domestic" corporation is one "created or organized in the United States or under the law of the United States or of any State or Territory;" all others are "foreign." Section 7701(a)(4) and (5), 1954 Code, Appendix, infra. For this purpose only Alaska and Hawaii were, before they attained Statehood in 1959, considered Territories; <sup>7/</sup>

<sup>5/</sup> Section 1.882-3(a)(1), Treasury Regulations on Income Tax (1954 Code), Appendix, infra; H. Rep. No. 2475, 74th Cong., 2d Sess., pp. 9-10 (1939-1 Cum. Bull. (Part 2) 667, 673-674); S. Rep. No. 2156, 74th Cong., 2d Sess., pp. 21-23 (1939-1 Cum. Bull. (Part 2) 678, 691-693); Paul and Mertens, Law of Federal Income Taxation (1939 Cum. Supp.), Secs. 37.15A, 37.15B.

<sup>6/</sup> The Foreign Investors Tax Act of 1966, P.L. 89-809, 80 Stat. 1539, Secs. 103-104, altered in some respects the language of Sections 881, 1442, and 1462, but, except as otherwise stated herein, the changes are not significant for the purposes of this case.

Regarding United States taxation of income earned in the United States by foreign corporations and individuals generally, see Roberts and Warren, U.S. Income Taxation of Foreign Corporations and Nonresident Aliens (Practicing Law Institute 1966); 8 Mertens, Law of Federal Income Taxation (1964 rev.), c. 45.

<sup>7/</sup> Section 301.7701-5, Treasury Regulations on Procedure and Administration (1954 Code), Appendix, infra. Compare the geographical meaning of "United States" in the Code; prior to 1959 it included "only the States, the Territories of Alaska and Hawaii, and the District of Columbia." Section 7701(a)(9), Internal Revenue Code of 1954 (26 U.S.C. 1958 ed., Sec. 7701). This provision was amended when the Territories became States and it presently makes no reference to Territories. Section 7701(a)(9), 1954 Code, as amended by Alaska Omnibus Act, P.L. 86-70, 73 Stat. 141, Sec. 22(a), and Hawaii Omnibus Act, P.L. 86-624, 74 Stat. 411, Sec. 18(i) (26 U.S.C. 1964 ed., Sec. 7701). And income derived from sources within Guam is not income from sources "within the United States." Sections 861(a) and 862(a), Internal Revenue Code of 1954 (26 U.S.C. 1964 ed., Secs. 861, 862).



Guam is considered a possession, <sup>8/</sup> and its corporations are thus foreign, for the purposes of the United States income tax. <sup>9/</sup> This is not to say that Guam is a foreign country. It is an "unincorporated territory" of the United States (Sec. 3, Organic Act of Guam, c. 512, 64 Stat. 384 (48 U.S.C. 1964 ed., Sec. 1421a)) -- and thus not a "Territory" as were Alaska and Hawaii; <sup>10/</sup> and it is under the sovereignty of the United States (see e.g., Sec. 1.911-1(a)(9), Treasury Regulations on Income Tax (1954 Code)(26 C.F.R., Sec. 1.911-1)).

<sup>8/</sup> See, e.g., Section 932(c), Internal Revenue Code of 1954 (26 U.S.C. 1964 ed., Sec. 932); Sections 1.901-2(c), 1.931-1(a), 1.957-3(b), Treasury Regulations on Income Tax (1954 Code)(26 C.F.R., Secs. 1.901-2, 1.931-1, 1.957-3).

<sup>9/</sup> Rev. Rul. 56-616, 1956-2 Cum. Bull. 589.

<sup>10/</sup> The legislative history of the Organic Act explains Guam's status as follows (H. Rep. No. 1677, 81st Cong., 2d Sess., p. 12):

As an unincorporated territory, Guam, like Puerto Rico and the Virgin Islands, is appurtenant to the United States and belongs to the United States but is not a part of the United States. Alaska and Hawaii are incorporated Territories and as such have a right, according to several Supreme Court decisions, to statehood. Unincorporated areas are not integral parts of the United States and no promise of statehood or a status approaching statehood is held out to them.





In asserting deficiencies in tax against the taxpayer with respect to interest and commissions received from Guam sources (i.e., John Sayre, doing business as Kirby and Company) in 1955 through 1957, the Commissioner determined that the taxpayer was a foreign corporation for Guam tax purposes and was subject to tax on the interest and commissions under Section 881 (I-R. 1, 7). The taxpayer sought a redetermination of the deficiencies, contending that it was not subject to tax by Guam in any respect, and, alternatively, that if it was taxable, it was engaged in business in Guam and thus taxable only with respect to its net income. (I-R. 1-5.) In sustaining the Commissioner, the District Court held that the taxpayer was subject to Guam tax on its income from Guam sources and entered judgment against the taxpayer for \$6,137, i.e., 30 percent of the total interest and commissions received, \$20,456.79. (I-R. 28-29, 30.) While the District Court made no express finding regarding the taxpayer's alternative argument, its conclusion implicitly rejected it. (I-R. 27-29.) On appeal the taxpayer contended that it was not a foreign corporation subject to tax in Guam under Section 881 and that even if it was taxable, it was entitled to offsetting deductions. Appellant's Opening Brief, pp. 5-6, 11-12; Appellant's Reply Brief, pp. 1-2. <sup>11/</sup> The panel of the Court reversed the District Court "on the authority" of the Atkins Kroll case, supra.

<sup>11/</sup> The taxpayer has abandoned the argument that it was engaged in business in Guam and did not invoke Section 882, Internal Revenue Code of 1954, Appendix, infra. Appellant's Opening Brief, pp. 2, 4, 7, 10; Appellant's Reply Brief, pp. 2, 3.



The District Court, we submit, properly held that the taxpayer was a foreign corporation for Guam tax purposes. The Atkins Kroll rationale has no application to the instant case, and in any event that case was incorrectly decided.

B. The rationale of the Atkins Kroll case has no application to this case

Assuming that the Atkins Kroll case was correctly decided on its  
12/  
facts, the rationale of that decision does not require that the taxpayer in this case be treated as a "domestic" corporation for Guam tax purposes. Unlike the Atkins Kroll case, there is here no multiple taxation problem.

In Atkins Kroll, a Guam corporation engaged in business in Guam, Atkins-Kroll (Guam) Ltd. ("A.K. Guam") was wholly owned (except for qualifying shares) by a California corporation, Atkins, Kroll and Company, Ltd. ("A.K. California"), which was not engaged in business in Guam. In 1958 A.K. Guam declared and paid a \$25,000 dividend to A.K. California. The District Court of Guam held that A.K. California was subject to the 30 percent Guam tax on dividends derived from Guam sources by a foreign corporation not engaged in business in Guam.

---

12/ We do not concede the correctness of that decision, and we urge the Court to disapprove it. See Part C, infra.



On appeal, A.K. Guam, the withholding agent, contended that A.K. California should not be considered a foreign corporation because the total Guam tax imposed on earnings distributed as dividends from Guam would amount to a tax of approximately 65 percent. A panel of this Court sustained A.K. Guam's position. It first decided that, for Guam tax purposes, the definition of a "domestic" corporation should be one "created or organized in GUAM or under the law of GUAM or of any State or Territory"<sup>13/</sup> (emphasis supplied). It then moved to the crux of the problem, i.e., whether the underscored portion should be omitted as "inapplicable language" under Section 31(e) of the Organic Act. Concluding that the phrase must be retained, the Court reasoned that (367 F. 2d, p. 129) --

with respect to [Section 881], unless the words "or of any State or Territory" are given full application, a manifest and substantial inequity results, for otherwise the combined Guam and Federal tax burden on the income which a California corporation ultimately receives from the business of its Guam subsidiary substantially exceeds the applicable corporate income tax rate under either the laws of Guam or the United States. We find nothing to indicate that Congress

---

<sup>13/</sup> The word "GUAM" indicates a substitution in Section 7701(a)(4), Internal Revenue Code of 1954, Appendix, infra, for the words "United States."





intended the Guam tax laws to be interpreted so as to reach such a result. 14 /

Thus, the basis for the decision, as the amicus A.K. Guam concedes (Br. 3-5), was the avoidance of an "inequity" presumed to arise from Guam's taxing corporate earnings twice -- once when earned by the corporation and once when paid to its shareholders as a dividend.

However, the instant case involves interest and commissions and such items are deductible from gross income in computing the net income of John Sayre subject to Guam individual income tax. Sections 162 and 163, Internal Revenue Code of 1954 (26 U.S.C. 1964 ed., Secs. 162, 163). Unlike the case of corporate earnings distributed as dividends, which are not deductible and thus are subject to Guam corporate income tax, amounts paid in the form of interest and commissions are deductible by their payor and therefore do not bear Guam income tax. However, like dividends, they constitute taxable income in the hands of their recipient and are

14 / The Court's reference to "Federal" taxes here is unclear. A.K. Guam paid no tax to the United States on its earnings since for United States tax purposes it was a foreign corporation that neither engaged in business in the United States nor received income from sources in the United States. 1954 Code, Sections 881, 882. If the Court in Atkins Kroll had held that A.K. California was subject to Guam tax under Section 881 on the dividend it received from A.K. Guam, A.K. California would have apparently paid no United States tax on the dividend. It would have been required to include the dividend derived from Guam in its gross income for United States tax purposes, but it would have claimed with respect to the Guam tax paid a foreign tax credit for income taxes paid to a possession (Sections 901, 902, and 904, Internal Revenue Code of 1954, Appendix, infra) equal to the United States tax liability incurred with respect to such dividends. See Opening Brief for Appellant, pp. 9-11; Atkins Kroll (Guam), Ltd. v. Government of Guam, 367 F. 2d 127 (C.A. 9th).



subject to Guam tax on the recipient, whether the recipient is a Guam citizen (Section 1, Internal Revenue Code of 1954 (26 U.S.C. 1964 ed., Sec. 1), a nonresident alien (including a United States citizen not resident in Guam) (Section 871, Internal Revenue Code of 1954 (26 U.S.C. 1964 ed., Sec. 871)<sup>15/</sup>, a Guam corporation (Section 11, Internal Revenue Code of 1954, Appendix, infra), a United States corporation engaged in business in Guam (Section 882, 1954 Code) or a United States corporation not engaged in business in Guam (Section 881, 1954 Code). Such income is derived from sources in Guam (Section 861(a)(1), (2), and (4), Internal Revenue Code of 1954 (26 U.S.C. 1964 ed., Sec. 861)), and Guam is entitled to levy a tax on such income in the same way that the United States taxes Guam corporations on such income derived from United States sources (Rev. Rul. 56-616, 1956-2 Cum. Bull. 589). In making the

---

<sup>15/</sup> For United States tax purposes Section 871(a) imposes a 30 percent tax on certain amounts (e.g., dividends, interest, and compensation) received from sources within the United States by a "non-resident alien individual" not engaged in business in the United States. A citizen of Guam resident in Guam is considered a nonresident alien for United States tax purposes. Section 932(a), Internal Revenue Code of 1954 (26 U.S.C. 1964 ed., Sec. 932); Sec. 1.932-1(a)(1) Treasury Regulations on Income Tax (1954 Code) (26 C.F.R., Sec. 1.932-1); Rev. Rul. 56, 1953-1 Cum. Bull. 303.

For Guam tax purposes, a United States citizen resident in the United States presumably would be a nonresident alien subject to Guam tax under Section 871 on dividends, interest, and commissions received from Guam sources. Cf. I.T. 2946, XIV -2 Cum. Bull. 109-110 (Virgin Islands).



Code applicable to Guam to levy a Guam Territorial income tax, Congress plainly intended that Guam should be able to raise revenue from sources within Guam for its governmental needs. Laguana v. Ansell, supra; see footnote 4 , supra. Neither the taxpayer nor the amicus A.K. Guam points to anything in the Code, the Organic Act, or the legislative history of Section 31 to indicate that Congress intended that Guam forego taxing income generated from activities or investments within its limits. Its jurisdiction to tax income from within its limits cannot be questioned. Cf. Continental Trading, Inc. v. Commissioner, 265 F. 2d 40 (C.A. 9th), certiorari denied, 361 U.S. 827. Consequently, the District Court properly entered judgment for the Commissioner notwithstanding the Atkins Kroll decision.

A.K. Guam suggests that the decision below may have been based on grounds other than the status of the taxpayer as a foreign corporation and that the decision may be affirmed on those grounds without reaching the question of its status. (Amicus Br. 5-6.) It is suggested that the taxpayer was the alter ego of the payor of the interest and commissions (i.e., that Sayre & Company, Ltd. is a sham), but it is sufficient to note that the taxpayer, the Commissioner, and the District Court accepted the reality of the manner in which John Sayre conducted his business through Kirby and Company in Guam and the taxpayer in Hawaii. (I-R. 1-4, 7, 27-29.) With respect to the





suggestion that the amounts of interest and commissions were excessive and constituted a diversion of taxable income from Guam, it has not been contended that the taxpayer received too much. And even if it be assumed that the payments were excessive, they still constituted income when received by the taxpayer. The District Court found that the amounts had been received (I-R. 28), and they are taxable to the taxpayer notwithstanding whether they were allowed in whole or part as deductible expenses of John Sayre.

A.K. Guam also advances a unique theory of United States-Guam tax relations, i.e., that Guam not tax any income which is taxable by the United States. (Amicus Br. 6-12.) The basic premise of this view is that it matters not whether a tax is paid to Guam or to the United States. (Amicus Br. 7.) In contending that the legislative history supports this position, the amicus quotes from Representative Miller's statement on the House floor during the debate on Section 31 of the Organic Act. (Amicus Br. 8.) It apparently ignores Representative Miller's first sentence ("There will be no direct payment by the Treasury of this country") just as it ignores the following question of Representative Scrivner, to which Representative Miller replied in the affirmative, that the Government of Guam "will be able to set up a tax structure sufficient to carry their own expenses of government without asking for any contributions from the United States." 96 Cong. Record, Part 6, p. 7577;



see footnote 4 , supra. The plain intent of Congress was to free itself of the need to make annual appropriations from the federal treasury and to permit Guam to raise its own revenues by taxing income, including income received by nonresident aliens and foreign corporations from sources within Guam. To adopt the position suggested by A.K. Guam would be to act directly contrary to the clearly expressed intent of Congress.

Moreover, A.K. Guam fails to reconcile its view with the rationale of the decision of this Court in Government of Guam v. Koster, 362 F. 2d 248. In that case, Guam residents who incurred losses in transactions in the United States were allowed to offset such losses against their Guam income. The Court reasoned that since they were taxable by Guam on their world-wide income, they were entitled to claim as deductions their world-wide losses. A.K. Guam's theory with respect to taxing income appears to have been rejected by the Koster case.

A.K. Guam fails to document the "double tax or excessive tax" situations to which it refers. (Amicus Br. 10-11.) Guam imposes only one tax, under Section 881, on interest and commissions which are received by foreign corporations from sources in Guam, and the United States allows credit for such taxes in computing the liability of the recipient for United States taxes. Section 901, 1954 Code.



In the light of what we will say regarding the taxation of corporate earnings distributed as dividends (Part C, infra), it cannot be said that the facts of the Atkins Kroll case present such a situation.

And the amicus points to no authority for allowing deductions against the 30 percent tax imposed by Section 881. (Br. 10-11.) The statute makes no such provision. See footnote 5 , supra.

Finally, the amicus argues that its position follows from the intent of Congress that "American business enterprise \* \* \* [in Guam] will have the full protection of American laws and legal procedure." (Amicus Br. 11-12.) However, there is here no question concerning the taxpayer's enjoyment of such advantages; Guam here seeks only to obtain the revenue for providing such benefits. Moreover, Congress has acted expressly in the field of tax benefits for investment in possessions, but none of the several Code provisions applies in the instant case.<sup>16/</sup> And Guam had no program granting tax exemptions or subsidies to industry during the years here in question.<sup>17/</sup> The

---

<sup>16/</sup> Sections 48(a)(2)(B)(vii), 931, 955(c)(3), Internal Revenue Code of 1954 (26 U.S.C. 1964 ed., Secs. 48, 931, 955); Executive Order No. 11,071, 27 Fed. Register 12875 (1962).

<sup>17/</sup> As to the Virgin Islands, see 33 Virgin Islands Code Ann., Sections 4041, 4061, 4071 (1966 Cum. Pocket Supp.); 26 U.S.C. 1964 ed., Sec. 934; H. Rep. No. 1131, 86th Cong., 1st Sess. 306 (1960-2 Cum. Bull. 811, 812-815). As to the Commonwealth of Puerto Rico's much broader program, see 13 Laws of Puerto Rico Ann., Sections 252, 252a, 252b (1966 Cum. Pocket Supp.); Revenue Act of 1926, c. 27, 44 Stat. 9, Section 261, as amended (48 U.S.C. 1964 ed., Sec. 845); Act of March 4, 1927, c. 503, 44 Stat. 1418, Section 1, as amended (48 U.S.C. 1964 ed., Sec. 741).





legislative history to which the amicus refers (Br. 11-12) reflects no intent that taxpayers such as Sayre & Company, Ltd., should receive a tax reduction when they lend credit and license franchises to those doing business in Guam. On the contrary, the pertinent legislative history reflects the intention that Guam should support itself from its own resources, including, under Section 881, taxing interest and commissions paid to foreign corporations from sources within Guam.

In sum, the result in the Atkins Kroll case-- treating a United States (California) corporation as a domestic corporation for Guam Section 881 tax purposes--is limited to the circumstances which existed there. The Court in Atkins Kroll did in fact expressly limit its decision to Section 881 (367 F. 2d, p. 129); the present case merely illustrates the fact that if the decision is to be maintained it should be limited to Section 881 income which is not deductible in computing its payor's Guam income tax, such as dividends. Since there is no multiple taxation in this case, there is no "equitable" reason for not applying the "mirror" and declaring that a United States (Hawaii) corporation such as the taxpayer is "foreign" for Guam tax purposes just as a Guam corporation is "foreign" for United States income tax purposes.



C. The Atkins Kroll case was wrongly decided

While it is possible to reconcile this Court's decision in Atkins Kroll with the judgment of the District Court in the instant case as we have indicated (Part B, supra), we urge that the Court reexamine the premise on which the Atkins Kroll case was decided and to disapprove that decision. As we have noted (see footnote 14, supra, and related text), the decision was based on the Court's judgment that Congress could not have intended that Guam tax corporate earnings twice. The decision, however, contains two basic defects: (1) It ignores the fundamental concept in the 1954 Code that a corporation and its shareholders are separate taxable entities, so that corporate income may be taxed once when earned by the corporation and again when received by the shareholders as a dividend; (2) the decision also violates the basic premise on which Guam's tax law is based, i.e., that Guam and the United States are separate and distinct taxing jurisdictions, so that Guam corporations are "foreign" for purposes of the United States income tax and United States corporations are "foreign" for purposes of the Guam tax. We shall first explain how the relevant sections of the 1954 Code operate in the United States and then analyze the changes and substitutions in the language of the Code that are necessary to convert these provisions of United States tax law into the Guam Territorial income tax.



- 24 -

1. Scheme of the 1954 Code

Section 11 of the 1954 Code imposes a tax of approximately 50 percent on the taxable income of "every corporation."<sup>18/</sup> Read literally this section would tax the world-wide income of "every corporation," foreign and domestic, regardless of whether it had any contact with the United States. Domestic corporations are, in fact, taxed by the United States on their world-wide net income. Section 61, Internal Revenue Code of 1954 (26 U.S.C. 1964 ed., Sec. 61) (gross income includes "all income from whatever source derived"); cf. National Paper Co. v. Bowers, 266 U.S. 373, 376.

However, Sections 881 and 882 of the Code provide special treatment for "foreign" corporations: Section 882 limits the Section 11 net corporate income tax on a foreign corporation engaged in business in the United States to its income from sources within the United States; Section 881 imposes in lieu of the Section 11 tax a 30 percent tax on the gross amount of certain items of income (e.g., dividends, interest, compensation) received from sources in the United States by a foreign corporation not engaged in business in the United States.

Thus it is important to determine whether a corporation is "domestic" or "foreign" since (1) a domestic corporation pays a tax

---

<sup>18/</sup> During recent years the rate of the Section 11 tax has varied around 50 percent and for the purpose's of this brief we shall use the figure 50 percent.





of approximately 50 percent upon its world-wide income, (2) a foreign corporation engaged in business in the United States pays a tax of approximately 50 percent on its net income from sources within the United States, and (3) a foreign corporation not engaged in business in the United States pays a tax of 30 percent on certain United States source gross income, including dividends, interest, and commissions paid by a United States corporation engaged in business in the United States.

As we have already pointed out (footnote 8 , supra, and related text), Guam is considered to be a "possession" and its corporations are thus "foreign", for United States income tax purposes.

Consequently, if a California or Hawaii corporation pays dividends, interest, or commissions to a Guam corporation not engaged in business in the United States, the United States tax authorities will (1) treat the Guam corporation as a foreign corporation, (2) collect an income tax of approximately 50 percent on the net earnings of the United States corporation under Section 11, and (3) collect a 30 percent tax on the gross dividends, interest and commissions paid by the United States corporation to the foreign (Guam) corporation under Section 881 -- a tax of 30 percent on the interest and commissions and an aggregate tax of approximately 65 percent on the <sup>19/</sup>dividends.

---

<sup>19/</sup> As we have seen, the interest and commissions are deductible for the purposes of computing the United States corporation's net income under Section 11 and thus bear only the 30 percent tax of Section 881. However, the dividends are not deductible in computing corporate taxable income and consequently corporate earnings distributed as dividends are subject to two taxes, a 50 percent tax (Section 11) when they are earned and a 30 percent tax (Section 881) when they are distributed to shareholders.



2. Conversion of the 1954 Code into the Guam Territorial  
income tax law

For Guam tax purposes, a "foreign" corporation under Section 7701 (a)(4) and (5), substituting "GUAM" for "United States" and omitting "inapplicable language" (Organic Act of Guam, Sec. 31(e)), should be a corporation which is not "created or organized in GUAM or under the law of GUAM or of any State or Territory" (emphasis supplied.)<sup>20/</sup>

Since Guam has no states or territories, we submit that the phrase emphasized in Section 7701(a)(4) should be omitted as "inapplicable language" (Section 31(e)). Only if this is done can the Guam tax function like the United States tax. Since a Guam corporation is for purposes of the United States income tax considered a foreign corporation, a United States corporation should for purposes of the Guam income tax be considered a foreign corporation. When a Guam corporation pays dividends, interest, and commissions to a United States corporation not engaged in business in Guam, Guam should be able to collect the same taxes which the United States tax authorities would collect in the reverse situation, i.e., (1) treat the United States corporation as a foreign corporation, (2) collect an income tax of approximately 50 percent on the net earnings of the

<sup>20/</sup> The word "GUAM" indicates substitution in place of the words "United States."



Guam corporation under Section 11, and (3) collect a 30 percent tax on the gross dividends, interest, and commissions paid by the Guam corporation to the foreign (United States) corporation under Section 881. As it was for United States tax purposes, the interest and commissions would bear a total tax of 30 percent and earnings distributed as dividends an aggregate tax of approximately 65 percent. See text following footnote 14, supra.

In declining to reach this result in Atkins Kroll, the Court stated that it could "find nothing to indicate that Congress intended the Guam tax laws to be interpreted so as to reach such a result." 367 F. 2d, p. 129. Accordingly, it retained the words "or of any State or Territory" in the phrase "created or organized in GUAM or under the law of GUAM or of any State or Territory" (Section 7701(a)(4)), and interpreted it to make a corporation organized in a State of the United States a domestic corporation for Guam tax purposes. However, examination of the Code demonstrates that Congress clearly did intend the United States (or Guam) to collect taxes aggregating more than 50 percent. This is illustrated by the following examples:

1. If a United States corporation is wholly owned by one or more United States citizens, the domestic corporation pays a 50 percent tax on its net income under Section 11 and, when it pays the after-tax earnings to its shareholders as dividends, they pay





individual income taxes under Section 1, Internal Revenue Code of 1954 (26 U.S.C. 1964 ed., Sec. 1) at rates up to 70 percent. Thus, the combined taxes from the two steps may total as much as 85 <sup>21/</sup> percent of the corporation's original earnings.

2. If a United States corporation is wholly owned by a foreign corporation which is not engaged in business in the United States, the domestic corporation pays the usual 50 percent corporate income tax under Section 11 and, when the domestic corporation pays the after-tax earnings to its foreign parent as a dividend, the parent pays a 30 percent tax under Section 881 on the gross dividend. Thus, the combined United States tax on the domestic subsidiary and <sup>22/</sup> the foreign parent is approximately 65 percent.

<sup>21/</sup> And State and local taxes may take an additional amount. The New York City and State corporate taxes, for example, amount to almost 11 percent of net income. Administrative Code of New York, City, Title R, City Business Tax, Sections R. 46-3.0, R. 46-4.0, R. 46-20.0, as enacted by L.L. 21, Laws 1966 (CCH New York Tax Reporter, pars. 193-306a, 193-307b, 193-346a) (5 1/2 percent tax); Tax Law, 59 McKinney's Consolidated Laws of New York Annotated, c. 60, Secs. 208-210 (5 1/2 percent tax). The Guam tax here in question is comparable to both the federal and the local income taxes in the United States.

<sup>22/</sup> Tax treaties with approximately 25 foreign countries, mostly in Western Europe, have reduced the 30 percent tax to 15 percent or, in some cases, to 5 percent. 4 CCH Standard Federal Tax Reporter (1968), par. 4206.05.



3. The foregoing result is equally true when the foreign parent is a Guamanian corporation, since for purposes of the United States income tax Guam corporations are foreign corporations. Rev. Rul. 56-616, 1956-2 Cum. Bull. 589. Thus, if the facts of the Atkins-Kroll case were reversed so that A.K. Guam was the parent corporation and A.K. California the wholly owned subsidiary, the United States would collect a combined tax of 65 percent on United States earnings paid as dividends to the Guamanian parent. For the purposes of computing the Guam corporate tax of A.K. Guam, Guam would allow credit for the United States tax paid. Sections 901 and 902, 1954 Code.

4. Moreover, this would also be true if the United States corporation was owned by one or more Guamanian citizens. The United States corporation would pay the usual 50 percent United States tax on its earnings and the Guamanian shareholders would be subject to the United States tax of 30 percent of the gross dividends paid to them by the United States corporation. Section 871(a), 1954 Code; see footnote 15, supra. The combined tax paid by the United States corporation and its individual Guamanian shareholders would be 65 percent. Guam would allow credits for United States taxes paid against the Guam tax liability of the Guamanians. Section 901, 1954 Code.

Thus it is clear that the scheme of the Code is generally to collect at least two taxes on corporate income--once when the income is earned by the corporation and once when after-tax income is paid to its shareholder or shareholders as a dividend, and it is not at all



unusual for the combined tax to reach 65 percent.<sup>23/</sup> The fact that the shareholders are foreign corporations or citizens affects only the rate of tax imposed at the shareholder level (i.e., whether a graduated tax on net income or a flat 30 percent tax on gross income) and the method of collection (i.e., whether the tax is collected from the shareholder or withheld by the payor corporation), not whether they are taxed at all on dividend income from United States sources.

In applying the Internal Revenue Code to Guam, Congress adopted the same scheme of taxing corporate earnings once when earned and once when distributed. If a Guamanian corporation is owned by one or more Guamanian citizens, Guam collects two taxes which, depending on the individual shareholders' tax brackets, might total as much as 85 percent. Sections 1 and 11, 1954 Code. However, if the same corporation is owned by one or more United States corporations, this Court in Atkins Kroll apparently assumed that Guam would be limited to the collection of only one tax, i.e., on the Guam corporation's net earnings (Section 11), and would have to exempt the recipients of the dividends from Guam tax even though the dividends are clearly from Guam sources. Thus Guam would collect less tax when a Guam corporation is owned by a United States corporation or corporations than when it is owned by Guamanians.

---

<sup>23/</sup> Nor is this pattern of taxation unique to the United States. All six members of the European Economic Community, for example, impose taxes on corporate earnings and then on earnings distributed as dividends, and the aggregate rates exceed the maximum corporate rate imposed. See Radler, Corporate Taxation in the Common Market, II Guides to European Taxation (International Bureau of Fiscal Documentation, Amsterdam 1964), pp. II-A:1 - II-A:11, II-D:6 - II-D:7.





This result clearly violates Congress' intent to give Guam a separate, "mirror" income tax act that would operate in Guam in the same way that the Internal Revenue Code operates within the United States. As we have pointed out, supra, if a Guam corporation has a United States subsidiary, the United States collects two taxes--one from the parent and one from the subsidiary--aggregating 65 percent. However, if a Guam subsidiary is owned by a United States corporation, the Atkins Kroll decision apparently results in Guam collecting only one tax of 50 percent.

Moreover, notwithstanding the Atkins Kroll decision, if a Guam corporation is owned by one or more individual United States citizens, Guam apparently collects two taxes aggregating 65 percent; it collects the usual 50 percent tax on the domestic corporation's earnings under Section 11 and then a 30 percent tax under Section 871, 1954 Code, supra, when the corporate earnings are distributed as dividends to nonresident alien individuals (i.e., United States citizens resident in the United States). <sup>24/</sup> Therefore, if a Guam corporation is wholly owned by a United States corporation, Guam under the Atkins Kroll decision collects only a 50 percent tax, but if the Guam corporation is owned by a United States individual, Guam collects combined taxes of 65 percent. Moreover, if the stock of the Guam corporation were owned one-half by a United States corporation and one-half by an individual

<sup>24/</sup> Presumably a United States citizen resident in the United States would be a nonresident alien for Guam tax purposes. Cf. I.T. 2946, XIV-2 Cum. Bull. 109-110 (1935) (Virgin Islands). And see footnote 15, supra.



United States citizen, Guam would collect a combined tax of 50 percent on the corporate earnings distributed as dividends to the United States corporation and combined taxes of 65 percent on the corporate earnings distributed as dividends to the United States individual.

In addition to the anomalies created by the Atkins Kroll decision with respect to the treatment of dividends, the Court's definition of foreign and domestic corporations as applied in the instant case would apparently result in Guam not collecting any tax on other amounts covered by Section 881 which are deductible items in computing the net income of the Guam payor (such as interest, salaries, and compensation) and which are subject to tax only under Section 881. Since such amounts are deductible in computing net income subject to the regular Guam individual or corporate income tax (Sections 1, 11), they do not bear any Guam tax. As we have pointed out (Part B, supra), exempting these amounts from any Guam tax is plainly contrary to the intent of Congress and reinforces the view that the decision is unsound.

Moreover, the Atkins Kroll decision leads to problems with respect to the administration of other provisions of the Code, since whether <sup>25/</sup> corporations are foreign or domestic is basic to Guam's tax system.

Indeed, in the Atkins Kroll case itself, A.K. Guam suggested that the

---

<sup>25/</sup> See, e.g., Sections 243(d), 245, 301(b)(1)(C), 367, 902, 951-964, 1246-1248, 1504(b)(3), Internal Revenue Code of 1954 (26 U.S.C. 1964 ed., Secs. 243, 245, 301, 367, 902, 951-964, 1246-1248, 1504).



rule which it sought had to be a qualified one, so that United States corporations were "domestic" for Guam's Section 881 but "foreign" for its Section 882 (taxing "foreign" corporations engaged in business in Guam).<sup>26/</sup> It was apparently in response to this suggestion that the Court expressly limited its decision to Section 881. 367 F. 2d, p. 129. Such piecemeal consideration of the many Code provisions will lead only to administrative chaos.

In its amicus curiae brief filed in the instant case, the taxpayer in Atkins Kroll suggests that the multiple taxes imposed on corporate earnings by Guam are (p. 4) "particularly harsh because the parent-subsidiary relationship involved in Atkins Kroll is one to which Congress has given special treatment for the specific purpose of preventing an excessive combined foreign and federal tax burden; see Internal Revenue Code § 902." The amicus correctly describes the function of Section 902 of the 1954 Code, i.e., "foreign taxes paid by a subsidiary are to be deemed paid by the parent for purposes of a credit against federal taxes" (p. 4). However, it does not note, as it did in its brief in Atkins Kroll,<sup>27/</sup> that the so-called "excessive \* \* \* tax" results despite the allowance of the Section 902 credit and that the tax was produced by the levy of two Guam taxes, not Guam and United

<sup>26/</sup> Opening Brief For Appellant, pp. 18-19; Atkins Kroll (Guam) Ltd. v. Government of Guam, supra.

<sup>27/</sup> Opening Brief For Appellant, pp. 9-11; Atkins Kroll (Guam) Ltd. v. Government of Guam, supra.





States taxes. And, as we have shown, supra, there is no doubt but that Congress intended that multiple taxes be imposed.

Finally, the argument pressed by the taxpayer in the Atkins Kroll case that it should be taxed at the same rates applicable had it established a branch in Guam instead of a corporate subsidiary is without merit. In electing to do business in Guam through a subsidiary, A.K. California's management presumably weighed the various disadvantages, including tax, against the advantages, such as limited liability, freedom of the parent from regulation by Guam, and transferability of the equity interest in the subsidiary. Having elected the corporate form, it cannot now claim a right to be taxed as if it had chosen a branch operation. See National Carbide Corp. v. Commissioner, 336 U.S. 422, 438-439; Moline Properties, Inc. v. Commissioner, 319 U.S. 436.

As we have demonstrated, the Section 881 tax is imposed by the United States with respect to "foreign" corporations, including those of Guam, receiving dividends and other income from United States sources; Guam, with its "mirror" income tax, should levy a similar tax on "foreign" corporations, including those of the United States, receiving such amounts from sources within Guam. We respectfully urge the Court to re-examine the Atkins Kroll decision in the light of the foregoing arguments and to disapprove it. Otherwise, an anomalous result will be reached in which a United States corporation will be "domestic" for both Guam and United States tax purposes, while a Guam corporation will be "domestic" to Guam but "foreign" for United States tax purposes.



D. In the alternative, the taxpayer is  
taxable on world-wide income under  
Section 11

Section 881 expressly states that it levies its 30 percent tax in lieu of the taxes imposed by section 11," the regular 50 percent corporate income tax imposed on the income of "every corporation." Section 11(d)(4) provides that the tax imposed by Section 11(a) does not apply to a corporation subject to tax under Section 881. Thus, when a corporation is exempted from tax under Section 881 because it is not a "foreign" corporation, it is automatically subject to tax under Section 11(a). In deciding the Atkins Kroll case, the Court apparently assumed that if A. K. California were treated as a "domestic" corporation under Section 881 for Guam tax purposes, A. K. California would be exempt from all Guam corporate income taxes, and that the earnings of A.K. Guam distributed to A.K. California would not be subjected to an additional Guam income tax. However, in view of the express language in Section 11 and Section 881, the actual consequence of the Atkins Kroll decision exempting A.K. California from Guam's Section 881 tax was to bring into effect Guam's Section 11 tax. This is consistent with the Court's holding; if A.K. California is not foreign for Guam tax purposes, it must be domestic. Guam taxes domestic corporations, as does the United States, under Section 11.

However, the consequence of applying Section 11 to A.K. California is to subject it to Guam tax on its world-wide income.



Guam taxes, as does the United States, its citizens and corporations on their world-wide income. Government of Guam v. Koster, 362 F. 2d 248, 249 (C.A. 9th) ("citizens of Guam are liable for a Territorial income tax on gross income derived from business transacted on mainland United States"); cf. National Paper Co. v. Bowers, supra. As a result, if the taxpayer in the instant case is to be treated as a "domestic" corporation for Guam tax purposes, it is subject to tax in Guam on its world-wide net income under Section 11. Indeed, each and every United States corporation, whether or not it derives income from sources within Guam, would be a "domestic" corporation for Guam tax purposes and would be subject to tax in Guam on its world-wide income. This result is contrary to the express policy announced by Congress in Section 881, but appears to be compelled by the Atkins Kroll decision. 28/

#### CONCLUSION

For the foregoing reasons, the judgment of the District Court is correct and should be affirmed.

Respectfully submitted,

HAROLD W. BURNETT,  
Attorney General, Government of Guam,  
Agana, Guam 96910.

MITCHELL ROGOVIN,  
Assistant Attorney General.

LEE A. JACKSON,  
HAROLD C. WILKENFELD,  
J. EDWARD SHILLINGBURG,  
Attorneys,  
Department of Justice,  
Washington, D. C. 20530.

MARCH, 1968.

28/ Consequently, if on rehearing the Court maintains the decision of the three judge panel in this case, the judgment below should be reversed and the case remanded for a redetermination of the tax liability of Sayre & Company, Ltd., under Section 11.

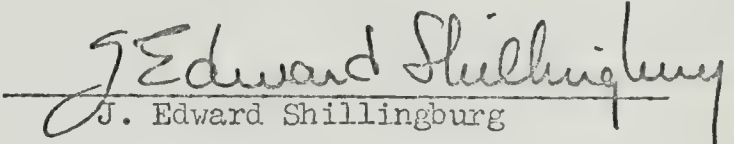




CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: 29 day of March, 1968.

  
J. Edward Shillingburg



APPENDIX

Internal Revenue Code of 1954:

SEC. 11. TAX IMPOSED.

(a) Corporations In General.--A tax is hereby imposed for each taxable year on the taxable income of every corporation. \* \* \*

\*

\*

\*

(d) Exceptions.--Subsection (a) shall not apply to a corporation subject to a tax imposed by--

\*

\*

\*

(4) section 881(a) (relating to foreign corporations not engaged in business in United States).

(26 U.S.C. 1964 ed., Sec. 11)

SEC. 881. TAX ON FOREIGN CORPORATIONS NOT ENGAGED IN BUSINESS IN UNITED STATES.

(a) Imposition of Tax.--In the case of every foreign corporation not engaged in trade or business within the United States, there is hereby imposed for each taxable year, in lieu of the taxes imposed by section 11, a tax of 30 percent of the amount received from sources within the United States as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income (including amounts described in section 631 (b) and (c) which are considered to be gains from the sale or exchange of capital assets).

\*

\*

\*

(26 U.S.C. 1964 ed., Sec. 881)

SEC. 882. TAX ON RESIDENT FOREIGN CORPORATIONS.

(a) Imposition of Tax.--A foreign corporation engaged in trade or business within the United States shall be taxable as provided in section 11.



(b) Gross Income.--In the case of a foreign corporation, gross income includes only the gross income from sources within the United States.

(c) Allowance of Deductions and Credits.--

\*

\*

\*

(2) Allocation of deductions.--In the case of a foreign corporation the deductions shall be allowed only if and to the extent that they are connected with income from sources within the United States; and the proper apportionment and allocation of the deductions with respect to sources within and without the United States shall be determined as provided in part I, under regulations prescribed by the Secretary or his delegate.

\*

\*

\*

(26 U.S.C. 1964 ed., Sec. 882)

SEC. 901 [as amended by Sec. 3(b), Act of September 14, 1960 P.L. 86-780, 74 Stat. 1010]. TAXES OF FOREIGN COUNTRIES AND OF POSSESSIONS OF UNITED STATES.

(a) Allowance of Credit.--If the taxpayer chooses to have the benefits of this subpart, the tax imposed by this chapter shall, subject to the limitation of section 904, be credited with the amounts provided in the applicable paragraph of subsection (b) plus, in the case of a corporation, the taxes deemed to have been paid under section 902. \* \* \*

(b) Amount Allowed.--Subject to the limitation of section 904, the following amounts shall be allowed as the credit under subsection (a):

(1) Citizens and domestic corporations.--In the case of a citizen of the United States and of a domestic corporation, the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States; \* \* \*

\*

\*

\*

(26 U.S.C. 1964 ed., Sec. 901)





SEC. 902. CREDIT FOR CORPORATE STOCKHOLDER IN FOREIGN CORPORATION.

(a) Treatment of Taxes paid by Foreign Corporation.--For purposes of this subpart, a domestic corporation which owns at least 10 percent of the voting stock of a foreign corporation from which it receives dividends in any taxable year shall be deemed to have paid the same proportion of any income, war profits, or excess profits taxes paid or deemed to be paid by such foreign corporation to any foreign country or to any possession of the United States, on or with respect to the accumulated profits of such foreign corporation from which such dividends were paid, which the amount of such dividends bears to the amount of such accumulated profits.

\*

\*

\*

(26 U.S.C. 1964 ed., Sec. 902)

SEC. 904. LIMITATION ON CREDIT.

(a) Limitation.--The amount of the credit in respect of the tax paid or accrued to any country shall not exceed the same proportion of the tax against which such credit is taken which the taxpayer's taxable income from sources within such country (but not in excess of the taxpayer's entire taxable income) bears to his entire taxable income for the same taxable year.

\*

\*

\*

(26 U.S.C. 1964 ed., Sec. 904)

SEC. 1442. WITHHOLDING OF TAX ON FOREIGN CORPORATIONS.

In the case of foreign corporations subject to taxation under this subtitle not engaged in trade or business within the United States, there shall be deducted and withheld at the source in the same manner and on the same items of income as is provided in section 1441 or section 1451 a tax equal to 30 percent thereof; except that, in the case of interest described in section 1451 (relating to tax-free covenant bonds), the deduction and withholding shall be at the rate specified therein.

(26 U.S.C. 1964 ed., Sec. 1442)



SEC. 1461. RETURN AND PAYMENT OF WITHHELD TAX.

Every person required to deduct and withhold any tax under this chapter shall, on or before March 15 of each year, make return thereof and pay the tax to the officer designated in section 6151. Every such person is hereby made liable for such tax and is hereby indemnified against the claims and demands of any person for the amount of any payments made in accordance with the provisions of this chapter.

(26 U.S.C. 1964 ed., Sec. 1461)

SEC. 1462. WITHHELD TAX AS CREDIT TO RECIPIENT OF INCOME.

Income on which any tax is required to be withheld at the source under this chapter shall be included in the return of the recipient of such income, but any amount of tax so withheld shall be credited against the amount of income tax as computed in such return.

(26 U.S.C. 1964 ed., Sec. 1462)

SEC. 7701. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof--

\*

\*

\*

(4) Domestic.--The term "domestic" when applied to a corporation or partnership means created or organized in the United States or under the law of the United States or of any State or Territory.

(5) Foreign.--The term "foreign" when applied to a corporation or partnership means a corporation or partnership which is not domestic.

\*

\*

\*

(26 U.S.C. 1964 ed., Sec. 7701)



Organic Act of Guam, c. 512, 64 Stat. 384:

Sec. 31. The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam.

(48 U.S.C. 1952 ed., Sec. 1421i.)

Sec. 31 [as amended by Sec. 1, Act of August 20, 1958, P.L. 85-688, 72 Stat. 681].

(a) The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam.

(b) the income-tax laws in force in Guam pursuant to subsection (a) of this section shall be deemed to impose a separate Territorial income tax, payable to the government of Guam, which tax is designated the "Guam Territorial income tax".

(c) The administration and enforcement of the Guam Territorial income tax shall be performed by or under the supervision of the Governor. Any function needful to the administration and enforcement of the income-tax laws in force in Guam pursuant to subsection (a) of this section shall be performed by any officer or employee of the government of Guam duly authorized by the Governor (either directly, or indirectly by one or more redelegations of authority) to perform such function.

(d) (1) The income-tax laws in force in Guam pursuant to subsection (a) of this section include but are not limited to the following provisions of the internal Revenue Code of 1954, where not manifestly inapplicable or incompatible with the intent of this section: Subtitle A (not including chapter 2 and section 931); chapters 24 and 25 of subtitle C, with reference to the collection of income tax at source on wages; and all provisions of subtitle F which apply to the income tax, including provisions as to crimes, other offenses, and forfeitures contained in chapter 75. For the period after 1950 and prior to the effective date of the repeal of any provision of the Internal Revenue Code of 1939 which corresponds to one or more of those provisions of the Internal Revenue Code of 1954 which are included in the income-tax laws in force in Guam pursuant to subsection (a) of this section, such income-tax laws include but are not limited to such provisions of the Internal Revenue Code of 1939.





(2) The Governor or his delegate shall have the same administrative and enforcement powers and remedies with regard to the Guam Territorial income tax as the Secretary of the Treasury, and other United States officials of the executive branch, have with respect to the United States income tax. Needful rules and regulations for enforcement of the Guam Territorial income tax shall be prescribed by the Governor. The Governor or his delegate shall have the authority to issue, from time to time, in whole or in part, the text of the income-tax laws in force in Guam pursuant to subsection (a) of this section.

(e) In applying as the Guam Territorial income tax the income-tax laws in force in Guam pursuant to subsection (a) of this section, except where it is manifestly otherwise required, the applicable provisions of the Internal Revenue Codes of 1954 and 1939, shall be read so as to substitute "Guam" for "United States", "Governor or his delegate" for "Secretary or his delegate", "Governor or his delegate" for "Commissioner of Internal Revenue" and "Collector of Internal Revenue", "District Court of Guam" for "district court" and with other changes in nomenclature and other language, including the omission of inapplicable language, where necessary to effect the intent of this section.

\*

\*

\*

(h) (1) Notwithstanding any provision of section 22 of this Act or any other provision of law to the contrary, the District Court of Guam shall have exclusive original jurisdiction over all judicial proceedings in Guam, both criminal and civil, regardless of the degree of the offense or of the amount involved, with respect to the Guam Territorial income tax.

(2) Suits for the recovery of any Guam Territorial income tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, under the income-tax laws in force in Guam, pursuant to subsection (a) of this section, may, regardless of the amount of claim, be maintained against the government of Guam subject to the same statutory requirements as are applicable to suits for the recovery of such amounts maintained against the United States in the United States district courts with respect to the United States income tax.



When any judgment against the government of Guam under this paragraph has become final, the Governor shall order the payment of such judgments out of any unencumbered funds in the treasury of Guam.

\*

\*

\*

(4) A civil action for the collection of the Guam Territorial income tax, together with fines, penalties, and forfeitures, or for the recovery of any erroneous refund of such tax, may be brought in the name of and by the government of Guam in the District Court of Guam or in any district court of the United States or in any court having the jurisdiction of a district court of the United States.

\*

\*

\*

(48 U.S.C. 1964 ed., Sec. 1421i)

Treasury Regulations on Income Tax (1954 Code):

§ 1.882-3 Deductions allowed foreign corporations.

(a) Nonresident foreign corporations--(1) General. For purposes of computing the tax imposed by section 881(a) and described in § 1.881-2, a nonresident foreign corporation shall not be allowed any deductions, since the tax is imposed upon the gross amount received from sources within the United States.

\*

\*

\*

(26 C.F.R., Sec. 1.882-3.)

Treasury Regulations on Procedure and Administration (1954 Code):

§ 301.7701-5 Domestic, foreign, resident, and nonresident persons.

A domestic corporation is one organized or created in the United States, including only the States (and during the periods when not States, the Territories of Alaska and Hawaii), and the District of Columbia, or under the law of the United States or of any State or Territory. A foreign corporation is one which is not domestic. A domestic corporation is a resident corporation even though it does no business and owns no property in the United States. A foreign corporation engaged in trade or business within the United States is referred to in the regulations in this chapter as a resident foreign corporation, and a foreign corporation not engaged in trade or business within the United States, as a nonresident foreign corporation. \* \* \*

(26 C.F.R., Sec. 301.7701-5.)



✓ ✓ ✓  
Nos. 20799, 20800, 20801

IN THE

See Vol.  
3378

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

MIRRO-DYNAMICS CORPORATION,

*Petitioner-Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent-Appellee.*

---

Petition for Rehearing and Suggestion for Rehearing  
by the Court En Banc.

---

WYSHAK & WYSHAK,

ROBERT H. WYSHAK,

LILLIAN W. WYSHAK,

9255 Sunset Blvd., 720,

Los Angeles, Calif. 90069,

*Attorneys for Appellant.*

---

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

FILED

APR 10 1967

APR 10 1967

W. D. LEE, CLERK





Nos. 20799, 20800, 20801

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

MIRRO-DYNAMICS CORPORATION,

*Petitioner-Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent-Appellee.*

---

Petition for Rehearing and Suggestion for Rehearing  
by the Court En Banc.

---

Mirro-Dynamics Corporation, pursuant to Rule 23 of this Court, respectfully petitions for a rehearing of the decision of this Court entered on March 10, 1967, and respectfully suggests that, in the event that rehearing is denied by the panel that rendered the decision, this petition be considered by the Court en banc.

After spelling out the contentions of the taxpayer and the Government, this Court affirms the granting of the Government's Motion for Summary Judgment in its one-paragraph conclusion [Op. 3] that the "difficulty which taxpayer faces here, and which it has not overcome, is not in showing . . ., but in showing. . . ." This taxpayer, which had hoped to prove its case to a jury and show what it intended to do and what it did do and whether it did have customers, has been foreclosed from having its day in Court to make any show-

ing at all. There is no doubt that if the taxpayer were to reduce all of the testimony it proposed to introduce at a trial to affidavit form in support of a motion for summary judgment on the part of the taxpayer, the Government would object thereto on the grounds that it would be precluded from cross-examining the taxpayer's witnesses. For this reason, the taxpayer could not, without a trial, "show" what the Court's opinion describes as taxpayer's difficulty. This was pointed up at the oral argument when Judge Jones asked if the taxpayer did have any customers. The response, with which Government counsel agreed, was that there was nothing in the record on the point as to the extent of any customer activity. There is nothing in the record to indicate that the taxpayer had no customers, which the Court's opinion apparently assumes.

This appeal cannot be properly disposed of without the Court's consideration of the specifications of error relating to the granting of the motion for summary judgment. If there are no genuine triable issues of fact in this case, then the myriad cases heard by this Court relating to the issue of whether a taxpayer is a dealer in real property turn only on legal rather than factual questions. It is submitted that the criteria are the same in both types of cases.

What was plaintiff's INTENT in the acquisition and disposition of securities? What was the nature of plaintiff's everyday business operation? What activities did plaintiff engage in in pursuit of its securities business? These are questions of fact which may not be disposed of by summary judgment.

Assuming for the sake of argument that this Court is willing to premise its decision on legislative history

which the Supreme Court has held should not be resorted to to create an ambiguity, as discussed in Appellant's Reply Brief, p. 7, the result is a *sub silentio* overruling of this Court's decision in *Chinook Inv. Co.*, 136 F. 2d 984. There is nothing in the statutory definition of a capital asset differentiating between securities and real property. The legislative history should not be used to do so where the statute is clear and not ambiguous. The result here urged is consistent with the Government's position prior to 1951 (according to the Government's brief, fn. 8).

Whether appellant may be denied its right to a trial by jury and its day in Court for the presentation of testimony and other evidence in this case involving over one-half million dollars is a question of such public importance that it should be considered by the Court en banc. It is submitted that the result here should have been consistent with that of Judge Barnes in *New and Used Auto Sales v. Hansen*, 245 F. 2d 951, 952, 953 (9th Cir. 1957), vitiating the judgments below, as the lower court failed to find that there were no genuine triable issues of material fact.

Wherefore Appellant prays that this Honorable Court grant this petition for rehearing, with oral argument of the case if deemed advisable by the Court.

Respectfully submitted,

WYSHAK & WYSHAK,

ROBERT H. WYSHAK,

LILLIAN W. WYSHAK,

*Attorneys for Petitioner-Appellant.*

Dated: April 7, 1967.

**Certificate of Counsel.**

I certify that in my judgment this petition for rehearing and suggestion for rehearing by the Court en banc is well founded and is not interposed for delay.

ROBERT H. WYSHAK

No. 20,807

IN THE

United States Court of Appeals  
For the Ninth Circuit

LESLY COHEN,

*Appellant,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

APPELLANT'S PETITION FOR REHEARING

JOHN V. LEWIS,

RICHARD H. FOSTER,

Suite 1102, Central Tower,

703 Market Street,

San Francisco, California 94103,

*Attorneys for Appellant  
and Petitioner.*

FILED

JUN 2 1967

WM. B. LUCK, CLERK





No. 20,807

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

---

LESLEY COHEN,

*Appellant,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

**APPELLANT'S PETITION FOR REHEARING**

---

*To the Honorable Chief Justice, and to the Honorable  
Associate Justices of the United States Court of  
Appeals:*

Appellant respectfully petitions this Honorable  
Court for a rehearing on the following two grounds:

**I**

**THE MOTION TO SUPPRESS**

Since the decision in this case the Supreme Court  
of the United States has had occasion to rule in a  
situation where the government has filed affidavits  
denying misconduct in connection with eavesdropping,  
*Hoffa v. U. S.*, No. 1003 denied May 27, 1967. In this  
case the Solicitor General informed the Supreme

Court that information secured as a result of wiretapping was neither used at the trial nor were investigative leads secured therefrom. The Supreme Court in rejecting the argument that such a statement in the absence of detailed evidentiary affidavits on the part of the petitioner foreclosed an evidentiary hearing stated as follows:

“We consider it more appropriate that each of these petitioners be provided an opportunity *to establish*, if he can, that the interception of this particular conversation or other conversations initiated in some manner his conviction.” (Emphasis added.)

In the instant case the opportunity to take deposition was denied by Judge Carter. The government however in its affidavit admits tampering with appellant's mail but denies any misconduct just as in *Hoffa* the government admitted an interception of a conversation but denied misconduct with respect to the case itself.

In view of the *Hoffa* decision we think the Court should reconsider its decision that setting forth misconduct in terms of the statute is insufficient and that without an affidavit from the government itself admitting misconduct a defendant is not entitled to an evidentiary hearing on mail tampering or wiretapping. The only opportunity for appellant to examine the witnesses who really knew the facts surrounding the wiretapping and the mail watch would have been at such a hearing; such an opportunity was denied and we believe so also was a fair trial.

## II

## SCHUMAN'S IMMUNITY REQUEST

This Court properly recognizes that counsel's cross-examination of the crucial witness, Schuman, was improperly limited. The Court however rejects the argument that this error should cause reversal on the basis that the jury was allowed access to the impeaching testimony by way of stipulation with the Government. See page 11 Opinion.

We respectfully point out to the Court that this assumption on the part of the Court is unfounded and incorrect. When Schuman at page 272 of the Transcript was questioned concerning a request for immunity, he denied any such request was made by him. Counsel then stated to the Court at page 273:

"For the purpose of the record your Honor I would like to read to the reporter in the *absence of the jury* . . . the question that I was going to ask here." (Emphasis added.)

After re-examination by the Government of the witness Schuman the Court ordered a recess, TR 278. Since both the Court of Appeals and the Government indicate that this matter was discussed in the presence of the jury we will set forth in haec verba the transcript from this point on:

"Ladies and gentlemen, we will take a few minutes recess at this time. Would you step out?

(Jury retires from the courtroom.)

The Court: Now, Mr. Foster, you desire to have the statement—you better identify it by Exhibit number and so forth, if it hasn't been already identified.

Mr. Foster: I am reading from Exhibit No. 16 of the Government and I am reading actually the last sentence of the statement.

The Court: Yes.

Mr. Foster: The question I desired to ask Mr. Schuman was as follows:

*'Both Mr. Schuman and his attorney assured me that given the proper immunity any information which they might have relating to our inquiry would be given, completely and truthfully.'* (Emphasis added.)

The Court: Go ahead.

Mr. Foster: I intended to ask the witness whether or not that statement was made by him in the manner summarized by the agent.

The Court: The record will show what the situation was, it is in the record. . . .

The Court: The record is made and the record is there and the ruling stands.

Mr. Foster: Thank you.

The Court: No change in the record at all. (Short recess.)"

The jury was not present when the statement of Mr. Schuman was identified for the record. The jury did not have the opportunity of knowing that Mr. Schuman had lied under oath concerning a request for immunity in connection with the prosecution of appellant. In view of the equivocal nature of Mr. Schuman's testimony this impeaching evidence was vital on the question of his credibility and memory. If there was a reasonable doubt as to the accuracy of Mr. Schuman's memory at the time of his placing the call, appellant should have been acquitted. This

crucial lapse of memory or deliberate lie on the part of Schuman should have been before the jury and its lack deprived the defendant of a fair trial.

Dated, San Francisco, California,  
May 31, 1967.

JOHN V. LEWIS,  
RICHARD H. FOSTER,  
*Attorneys for Appellant  
and Petitioner.*

---

CERTIFICATE OF COUNSEL

We hereby certify that in our judgment this petition for rehearing is well founded and is not interposed for delay.

Dated, San Francisco, California,  
May 31, 1967.

JOHN V. LEWIS,  
RICHARD H. FOSTER,  
*Attorneys for Appellant  
and Petitioner.*







N O. 2 0 8 1 2 /

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

ROBERT FRANCIS BEAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

FILED

MAY 13 1967

APPELLEE'S BRIEF

WM. B. LUCK, CLERK

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
CENTRAL DIVISION

WM. MATTHEW BYRNE, JR.,  
United States Attorney,  
ROBERT L. BROSIO,  
Assistant U. S. Attorney,  
Chief, Criminal Division,  
MICHAEL D. NASATIR,  
Assistant U. S. Attorney,

600 U. S. Court House  
312 North Spring Street  
Los Angeles, California 90012

Attorneys for Appellee,  
United States of America.

MAY 18 1967



N O. 2 0 8 1 2

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

ROBERT FRANCIS BEAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
CENTRAL DIVISION

---

WM. MATTHEW BYRNE, JR.,  
United States Attorney,  
ROBERT L. BROSIO,  
Assistant U. S. Attorney,  
Chief, Criminal Division,  
MICHAEL D. NASATIR,  
Assistant U. S. Attorney,

600 U. S. Court House  
312 North Spring Street  
Los Angeles, California 90012

Attorneys for Appellee,  
United States of America.



## TOPICAL INDEX

	<u>Page</u>
Table of Authorities	ii
I      STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION.	1
II     STATUTES INVOLVED	3
III    QUESTIONS PRESENTED	3
IV    STATEMENT OF THE FACTS	4
V     ARGUMENT	5
A.      THERE WAS SUFFICIENT EVIDENCE OFFERED AT TRIAL FOR THE COURT TO CONCLUDE BEYOND A REASON- ABLE DOUBT THAT THE DEFENDANT WAS SANE AT THE TIME OF THE COMMISSION OF THE OFFENSE.	5
B.      EVIDENCE WAS SUFFICIENT FOR THE TRIER OF FACT TO CONCLUDE THAT APPELLANT WAS COMPETENT TO WAIVE HIS RIGHT TO COUNSEL.	9
CONCLUSION	10
CERTIFICATE	11





## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Brown v. United States, 351 F. 2d 473 (5th Cir. 1965)	7
Fraker v. United States, 294 F. 2d 859 (9th Cir. 1961)	8
<u>Statutes</u>	
Title 18, United States Code, §2312	1, 2, 3
Title 18, United States Code, §3231	2
Title 18, United States Code, §4208(a)(2)	2
Title 18, United States Code, §4246	2
Title 28, United States Code, §1294(1)	2
<u>Rules</u>	
Federal Rules of Criminal Procedure:	
Rule 37(a)	2



IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

ROBERT FRANCIS BEAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

I

STATEMENT OF PLEADINGS AND FACTS  
DISCLOSING JURISDICTION

---

On February 10, 1965, the Federal Grand Jury for the Southern District of California returned an indictment in one count charging a violation of Title 18, United States Code, Section 2312 in that Robert Francis Bean transported a stolen 1957 Kenworth Tractor, a motor vehicle, in interstate commerce from Nogales, Arizona to San Bernardino County, California, within the Central Division of the Southern District of California, knowing said vehicle to have been stolen.



Pursuant to appellant's motion on April 5, 1965, Dr. A. R. Tweed was appointed by the District Court to examine appellant to determine his mental competency to stand trial and whether he was insane at the time of the commission of the offense. On May 27, 1965 a hearing was held to determine appellant's competency to stand trial. The Honorable Charles H. Carr, United States District Judge, found that on the basis of Dr. Tweed's report, the defendant was presently insane, unable to understand the proceedings against him, and unable to properly assist in his own defense. The defendant was ordered committed to the custody of the Attorney General, pursuant to Title 18, United States Code, Section 4246. Appellant was committed to the Federal Hospital in Springfield, Missouri and on December 13, 1965, another hearing was held to determine his competency to stand trial. At this hearing, appellant was found to be mentally competent. Defendant pleaded not guilty and a waiver of jury was filed. Trial before the Honorable Peirson M. Hall, United States District Judge, was commenced on January 3, 1966. On that day, the court found appellant guilty of violating Title 18, United States Code, Section 2312, and sentenced him to serve a 5-year term of imprisonment under Title 18, United States Code, Section 4208(a)(2). On January 14, 1966, appellant filed a timely notice of appeal.

Jurisdiction of the District Court was based on Title 18, United States Code, Section 3231 and Title 18, United States Code, Section 2312. Jurisdiction of this court is based on Title 28, United States Code, Section 1294(1) and Rule 37(a) of the Federal





II

STATUTES INVOLVED

Title 18, United States Code, Section 2312, reads as follows:

"Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than \$5,000 or imprisoned not more than five years, or both."

III

QUESTIONS PRESENTED

A. Was there sufficient evidence offered at trial for the trier of fact to conclude that defendant was sane at the time of the commission of the offense.

B. Was there sufficient evidence for the trier of fact to conclude that appellant was competent to waive his right to counsel when interrogated by agents of the FBI concerning the instant offense.



#### IV

#### STATEMENT OF THE FACTS

The essential facts surrounding the commission of this offense are not in dispute. On or about January 22, 1965, in Nogales, Arizona, the defendant stole a diesel tractor used for the transportation of produce by semi-truck and trailer. He drove the tractor to California and was arrested in possession of the vehicle in Needles, California, on January 25, 1965. The defendant admitted these facts to Agent Harold Newpher of the Federal Bureau of Investigation on January 27, 1965 [R. T. 6, 8, 9, 10, 11]. 1/

Solely at issue in the trial and on this appeal are the defendant's mental competency at the time he made statements to agents of the Federal Bureau of Investigation and his sanity at the time of the commission of the offense. On this issue a psychiatrist, Dr. Andre R. Tweed, testified for the defendant at trial. Other evidence before the court included testimony of lay witnesses who had contact with the defendant at or about the time the offense was committed, the statements of Dr. Tweed on cross-examination and medical reports from the Medical Center at Springfield.

---

1/ R. T. refers to Reporter's Transcript of Record.



ARGUMENT

- A. THERE WAS SUFFICIENT EVIDENCE OFFERED AT TRIAL FOR THE COURT TO CONCLUDE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS SANE AT THE TIME OF THE COMMISSION OF THE OFFENSE.
- 

The court heard testimony from Agent Harold Newpher in which he related a conversation between himself and defendant on January 27, or two days subsequent to the commission of the offense. The interview lasted approximately two hours and the agent had ample opportunity to observe the defendant's manner and demeanor [R. T. 7].

Agent Newpher noticed nothing unusual about the defendant's speech, his reactions to questions, or his general demeanor [R. T. 7]. The defendant appeared to be in possession of his senses and to know what was going on, what was said to him, and where he was [R. T. 7]. He was oriented as to time and place and in the agent's opinion understood the subject of the conversation [R. T. 8].

After being advised of his rights, the appellant related the circumstances surrounding the offense in detail [R. T. 9]. He remembered and related specific dates, places, and times, relating his activities two days prior to the theft and two days subsequent [R. T. 9, 10, 11]. The defendant also told the agent that he eventually intended to take the vehicle to Alabama and register the





vehicle in his own name [R. T. 11].

Significantly, the defendant traced on a map the circuitous route that he followed while transporting the stolen vehicle, and pointed out to the agent that he took this roundabout way in order to avoid being seen in the vehicle [R. T. 11].

The defendant also said that he did not know who owned the vehicle [R. T. 11].

On cross-examination the agent said that the appellant was not belligerent at any time during the interview and that he was able to verify a portion of the defendant's story concerning his leaving another stolen truck in Nogales, Arizona prior to taking the vehicle involved in the instant offense [R. T. 15]. The defendant's statements as to various items he left in this truck were also verified [R. T. 28].

Agent Albert Carlbloom of the Federal Bureau of Investigation testified to a conversation between he and the defendant on March 4, 1965. Defendant told Mr. Carlbloom that he had come to Nogales, Arizona in January, 1965. He said that he arrived there with a 1958 Ford pickup and related to the agent the license number of the truck and some personal items that he had left inside it [R. T. 19].

On March 9, Mr. Carlbloom had another conversation with the appellant. During this conversation, the defendant appeared to be rational and his responses were relevant to the agent's questions [R. T. 21]. After again being advised of his rights, the defendant related the circumstances of the theft of the tractor and



his subsequent journey with it [R. T. 21].

On cross-examination the agent testified that the defendant had told him that he had stolen the Ford pickup truck which he had abandoned in Nogales prior to the tractor theft. It was verified that the truck had indeed been stolen in Nevada [R. T. 23].

Dr. Andre R. Tweed testified that the appellant did not have the capacity to understand the nature and quality of his acts and did not know right from wrong at the time the offense was committed. However, on cross-examination the doctor said that the appellant obtained the vehicle voluntarily and with intent to deprive the owner of possession and ownership of it [R. T. 34: 10-14]. He also testified that the appellant was aware that the law prohibited the act he committed and that he knew that he was prohibited by law from taking and transporting the vehicle [R. T. 35:8-11]. The doctor also said that the appellant knew the difference between right and wrong but not in the same way as the doctor and the prosecutor [R. T. 38:23-25].

It is clear that the trier of fact is not required to accept the opinion of experts nor to reject those of lay witnesses in determining whether the defendant is insane. Brown v. United States (5th Cir. 1965), 351 F.2d 473.

Since appellant did not contend at the trial, and does not do so now, that his act was the result of an uncontrollable act or irresistible impulse, the issue is whether he knew the nature and quality of the act he committed and whether he knew it was wrong. From the foregoing facts, it can be seen that there was ample



evidence, taking the view most favorable to the government, upon which to base a finding that the defendant was sane. Therefore, the verdict of the trial judge as the sole trier of fact in this case must be sustained.

Fraker v. United States, 294 F.2d 859, 861  
(9th Cir. 1961).

Nor do the medical reports from the Springfield Medical Center, prepared as part of a complete study between June and September of 1965, aid the appellant in this regard. Most of the information cited in appellant's brief at pages 7 and 8 was given by appellant's mother. The classification study reveals that the mother was quite elderly and the information that she had was limited [M. R. 6]. Other information was given by the appellant, who the report says "has given incorrect information, misleading information, and has withheld information" and who "is bright enough to be skillful about working to his own advantage" [M. R. 6].

Although the patient had given a detailed account of the offense to Mr. Newpher two days after its commission, he professed amnesia as to those events when he spoke with doctors at Springfield. The period just prior to the present offense was the only real memory deficit indicated [R. T. 16, 20], and the staff psychiatrist felt that the patient "might be trying to appear somewhat more disturbed than he may actually be" [R. T. 16]. The staff psychologist noted that the patient was not grossly disorganized and that his contact with reality was sufficiently good to allow him





to respond in a socially acceptable manner when it is to his benefit [M. R. 19]. The entire report smacks heavily of malingering on the appellant's part, a fact of which the trial court was aware [R. T. 36]. Additionally there is nothing in the report to indicate that the appellant was anything more than a borderline psychotic with a mild brain syndrome or that he did not know the difference between right and wrong or the nature and quality of his act.

**B. EVIDENCE WAS SUFFICIENT FOR  
THE TRIER OF FACT TO CONCLUDE  
THAT APPELLANT WAS COMPETENT  
TO WAIVE HIS RIGHT TO COUNSEL.**

---

There is no contention that appellant was not apprised of his right to silence and counsel before making statements admitted into evidence. Appellant argues that he was not mentally competent to waive his right to counsel before he spoke with agents. The evidence outlined under Point I of this brief is sufficient for the trier of fact to conclude that appellant was mentally competent to waive his right to counsel and to voluntarily speak with agents. Additionally, Dr. Tweed testified on cross-examination that at the time of the interviews the defendant knew he was talking to law enforcement officials, and that they were involved in an investigative function relating to a criminal statute [R. T. 39]. Dr. Tweed also said that the defendant was aware of his right to an attorney and his right to remain silent [R. T. 40].



## CONCLUSION

Since there is substantial basis in the evidence for the trial court's verdict and rulings, the judgment below should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,  
United States Attorney,

ROBERT L. BROSIO,  
Assistant U. S. Attorney,  
Chief, Criminal Division,

MICHAEL D. NASATIR,  
Assistant U. S. Attorney,

Attorneys for Appellee,  
United States of America.



## CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Michael D. Nasatir  
MICHAEL D. NASATIR





No. 20819 ✓

---

In the  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

AUGUSTUS GEETER,  
Appellant-Defendant

v.

UNITED STATES OF AMERICA,  
Appellee-Plaintiff

---

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE  
NORTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION  
HONORABLE ALFONSO J. ZIRPOLI, Judge

---

BRIEF OF APPELLANT

---

ROLAND E. BRANDEL  
120 Montgomery Street  
San Francisco, California  
94104

Attorney for Appellant

FILED

MAY 1 1960



In the  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

AUGUSTUS GEETER,  
Appellant-Defendant

v.

UNITED STATES OF AMERICA,  
Appellee-Plaintiff

---

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE  
NORTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION  
HONORABLE ALFONSO J. ZIRPOLI, Judge

---

BRIEF OF APPELLANT

---



## TABLE OF CONTENTS

	<u>Page</u>
JURISDICTION . . . . .	1
STATEMENT OF THE CASE . . . . .	1
SPECIFICATION OF ERRORS . . . . .	5
ARGUMENT . . . . .	5
The Prosecutor Committed Prejudicial Error By Misconduct In His Closing Argument.	5
A. The Prosecutor's References to Facts Not in Evidence and to Contradictory Facts, and His References to Certain Facts in Testimony, When the Only Testimony was Clearly to the Contrary, Constitute Prejudicial Misconduct Not Cured Below. . . . .	5
B. The Prosecutor Violated the Fifth Amendment Protections Afforded Persons Accused of Crimes By Drawing the Attention of the Jury to Appellant's Silence . . . . .	10
CONCLUSION . . . . .	14





<u>Cases cited</u>	<u>Page</u>
<u>Berger v. United States</u> , 295 U.S. 78, 88 (1935) . . . . .	5, 7, 8, 9
<u>Carlin v. United States</u> , 351 F.2d 618 (5th Cir. 1965) . . . . .	11
<u>Chapman v. State of California</u> , 386 U.S. 18, 24, 87 Sup. Ct. 824, 828 (1967) . . . . .	14
<u>Chicago &amp; N.W. Ry. v. Kelly</u> , 84 F.2d 569, 573 (8th Cir. 1936) . . . . .	8
<u>Griffin v. California</u> , 380 U.S. 609, 85 Sup. Ct. 1229 (1965) . . . . .	11
<u>Hockaday v. Red Line, Inc.</u> , 174 F.2d 154, 156 (D.C. Cir. 1949) . . . . .	9
<u>Johnson v. United States</u> , 318 U.S. 189, 196-97 (1943) . . . . .	11
<u>London Guaranty &amp; Accident Co., Ltd. v.</u> <u>Woelfle</u> , 83 F.2d 325, 340 (8th Cir. 1936) .	8
<u>Robinson v. United States</u> , 32 F.2d 505, 508, 510 (8th Cir. 1928) . . . . .	10
<u>Schmerber v. California</u> , 384 U.S. 757, 765-66 n.9 (1966) . . . . .	11
<u>Smith v. Decker</u> , 270 F. Supp. 225 (1967) . . . .	13
<u>Stewart v. United States</u> , 366 U.S. 1 (1961) . .	12
<u>United States v. Schwartz</u> , 325 F.2d 355, 358 (3d Cir. 1963) . . . . .	9

## Statutes

18 U.S.C. § 3231 . . . . .	1
18 U.S.C. § 2113(a) . . . . .	1
18 U.S.C. § 371 . . . . .	1
28 U.S.C. § 1291 . . . . .	1
28 U.S.C. § 1294(1) . . . . .	1



## JURISDICTION

This case is before the court on the appeal of Augustus Geeter (appellant) from the conviction and final judgment of the District Court of the United States for the Northern District of California, Southern Division (Alfonso J. Zirpoli Judge), rendered pursuant to jurisdiction conferred by 18 U.S.C. section 3231. The final judgment of the District Court sentenced appellant for violations of 18 U.S.C. sections 2113(a) and 371, the crimes of bank robbery and conspiracy respectively. Appellant invokes the jurisdiction of this court under 28 U.S.C. sections 1291 and 1294(1).

## STATEMENT OF THE CASE

On May 25, 1965, a branch of the Bank of America at Hays and Divisadero Streets in San Francisco (RT 20) was robbed by a man and a woman. Diana Campbell and Edward Lucas were identified as the robbers and were tried and convicted prior to the instant trial. Lucas, also known as "Droopy," and Campbell entered the bank about noon. Each had a note they intended to hand to a bank teller. The teller who read Lucas's note gave him \$252 (RT 27, 28). The teller who read Campbell's note said to her, "I know you are kidding," whereupon Campbell lost her nerve and walked out of the bank without any money (RT 87, 88).



Mr. Peters, a teller, followed the robbers into the street (RT 35-36). He was joined later by the operations officer, Mr. Katz, who was driving a car (RT 39). Mr. Katz and Mr. Peters followed the robbers' activities closely, attempted to be as observant as possible (RT 47). Both men followed Campbell and Lucas in Mr. Katz's car and observed Campbell getting into a 1956 Oldsmobile being driven by a third party and Lucas disappear through a vacant lot (RT 39-44) and were able to identify both Lucas and Campbell.

On the night of the bank robbery Miss Campbell changed her hair color at the Manor Plaza Hotel (RT 99, 100) and she, appellant, and a Mr. Morgan went to Oakland, California to stay that night in another hotel. The next day the three drove in the same car to Los Angeles, California (RT 101-102) where appellant sought to renew his contract with a recording studio (RT 253-54).

The primary witness presented by the prosecution was Diana Campbell, a woman who was convicted of the robbery, but at the time of the trial still was awaiting sentence (RT 85), and hoped for leniency from the court (RT 125-26). Campbell worked as a prostitute both in Los Angeles prior to coming to San Francisco and in San Francisco while she lived in the same apartment with the appellant (RT 111, 117). This woman accused appellant of initiating, planning, and directing the robbery (RT 95-96, 142-44). She also accused him of driving the getaway car (RT 91-92), a green 1956







Oldsmobile that was identified as a car lent to appellant a month previous to the robbery by Dennis Gully (RT 53, 54). Further, she testified that about a month after the robbery, when FBI agents came to arrest her at her Los Angeles apartment, appellant was present in her apartment but leaped out of a window and fled the premises before the agents gained entry into the building (RT 104-06).

Appellant testified that on the day of the robbery he was working in Oakland on a construction project with a man named Slim (RT 220-22). Appellant's testimony that Slim picked him up in San Francisco on the morning of the robbery and transported him to the job in Oakland (RT 221) was verified by a disinterested witness, Freddy Morgan. Mr. Morgan testified that he was talking to appellant somewhere between 8:00 and 9:00 o'clock on the morning of the bank robbery, that a man pulled up to the hotel in which appellant lived, and that appellant drove off with the other man in the car saying that he was going to work in Oakland (RT 192-94). Appellant also testified that he was not in Miss Campbell's apartment when the FBI agents arrived to arrest her but rather was getting his hair cut in a barber shop in the neighborhood at that time (RT 225).

Although appellant was accused of driving the getaway car by Miss Campbell (RT 91-92), the prosecution fingerprint expert, Roy E. Kramer, testified that the only set of identifiable prints that belonged to appellant in the getaway car was found on the inside left front vent



window (RT 72). Miss Campbell's fingerprints, in comparison, were found "on the left door glass on the inside, on the back of the rear view mirror, on the steering wheel hub and on the inside of the windshield on the right side" (RT 72). Many other fingerprints were found in the car, but were not identified. Further, Mr. Peters and Mr. Katz, both of whom were taking special pains to be observant and who came within thirty feet of the driver of the getaway car (RT 48), could not identify appellant as the person who drove the car (RT 42-43).

During oral argument to the jury the United States Attorney argued facts not in evidence after a warning by the Court to refrain from doing so (RT 291-92). Further, it appears that some of the facts argued by the prosecutor were false and misleading (RT 274, 290-92). The prosecutor also argued on two occasions in such a manner as to bring to the attention of the jury appellant's choice to remain silent in the face of criminal accusations in violation of Fifth Amendment protections (RT 288-89). The Court did not admonish the jury to disregard any of these improper arguments at the time they were offered and the cautionary instruction regarding statements in argument was too general to be effective (RT 351).





## SPECIFICATION OF ERRORS

The prosecutor's misconduct by arguing incorrect facts, by arguing facts not in evidence, by drawing inferences from those incorrect and non-evidentiary facts, and by his repeated reference to appellant's choice to remain silent in the face of criminal accusations constitutes prejudicial error not cured below and calls for reversal.

### ARGUMENT

#### The Prosecutor Committed Prejudicial Error By Misconduct In His Closing Argument.

- A. The Prosecutor's References to Facts Not in Evidence and to Contradictory Facts, and His References to Certain Facts in Testimony, When the Only Testimony Was Clearly to the Contrary, Constitute Prejudicial Misconduct Not Cured Below.

In Berger v. United States, 295 U.S. 78, 88 (1935), the Supreme Court stated that the interest of a United States Attorney in a criminal prosecution is not to win a case but to see that justice is done. "[W]hile he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

The United States Attorney failed to live up to





that obligation in this case. He attempted to introduce testimony of an FBI agent relative to the agent's attempts to locate an individual, Slim, referred to by appellant as a companion in Oakland during the time the robbery occurred in San Francisco. The court firmly repulsed the attempt (RT 273-74) and struck the statements made by the agent from the record. The prosecutor knew full well that no part of this testimony was in evidence and that, therefore, any reference to the testimony would be blatantly improper. Nevertheless, in his summation to the jury, he not only referred to the agent's testimony, only to have the court strike the reference, but he immediately thereafter proceeded to draw detrimental and prejudicial inferences based on that stricken testimony (RT 291-92). The prosecutor dwelled at length on the impossibility of the government verifying appellant's alibi given the sketchy description available of Slim, a fact not in evidence. He intended to infer thereby that appellant was withholding information on Slim because Slim was a fiction of appellant's imagination. Most strikingly, the improper argument and inferences were foisted upon the jury after the court gave explicit instructions to the prosecutor that he was not to refer to this testimony: "I am striking it. There is nothing in this record that shows that on the part of anyone to locate Slim, and for present purposes it's not proper." (RT 291.)

Further, the facts upon which the prosecutor was



proceeding, even though not in evidence, appear inconsistent. It seems that either the prosecutor's presentation to the judge in attempting to introduce Padden's testimony or his presentation to the jury in argument was based on a factually incorrect premise. In argument, he strained to convince the jury that only the most tenuous of descriptions of Slim was available (RT 291-92). Yet, when the prosecutor earlier was attempting to induce the court to admit the agent's testimony, he said that the description of Slim provided by appellant was "fairly complete" (RT 274). Whichever factual basis was incorrect, it is unseemly for an officer of the government to reduce the integrity of the fact-finding process in such a way by arguing from a knowingly false premise. Prosecutor's conduct during the trial scarcely constituted that scrupulously fair and honest performance of duty demanded by Berger v. United States, supra.

Nor, it should be noted, was this the only occasion on which the prosecutor misrepresented the facts in evidence. Again attempting unfairly to cast doubt on appellant's alibi, the prosecutor argued that appellant had testified that he was in the Tiki barbershop at the time of Campbell's arrest (RT 290), a barbershop relative to which the prosecutor introduced evidence to prove that it did not exist on that date. The prosecutor was expressly warned by the court during cross examination (RT 257) that appellant's





testimony was not to that effect. Even then the prosecutor carefully questioned appellant further on the issue and was again told that appellant was not in the Tiki barber-shop on the day in question (RT 257-60). Nevertheless, he argued to the jury the direct opposite of appellant's testimony. Fitting a prosecution theory, hence inferences, to facts is permissible. Fabricating facts to fit a prosecution theory is impermissible, is prejudicial, and must be condemned by the judiciary.

In the trial of cases to a jury, the argument of counsel must be confined to the issues of the case, the applicable law, the pertinent evidence and such legitimate inferences as may properly be drawn therefrom. (See London Guaranty & Accident Co., Ltd. v. Woelfle, 83 F.2d 325, 340 (8th Cir. 1936); Chicago & N.W.Ry. v. Kelly, 84 F.2d 569, 573 (8th Cir. 1936). In this case, the prosecutor violated this rule by arguing facts that were not in evidence and were incorrect and by drawing impermissible inferences. His zeal to secure a conviction in this second trial of appellant, after the jury refused to convict in the first trial, can provide no excuse for his misconduct, however understandable it is. The improper suggestions he made in his summation unfairly tainted appellant's testimony concerning his alibi and therefore improperly influenced the jury. The court in Berger v. United States, supra, stated that the average jury has confidence that the obligations





that rest upon the prosecuting attorney will be faithfully observed. "Consequently, improper suggestions, insinuations . . . are apt to carry much weight against the accused when they should carry none." (295 U.S. at 88.) The prosecutor denied appellant the fair consideration of his case due him by law. Appellant may have been acquitted if these improper and prejudicial remarks were omitted, for the jury was required to disbelieve appellant's testimony, of which Slim's presence was an integral part, before it could convict.

The prosecutor's improper argument cannot be said to have been cured by actions of the court. As stated in Hockaday v. Red Line, Inc., 174 F.2d 154, 156 (D.C. Cir. 1949): "It is the duty of the court and of its officers . . . to prevent the jury from the consideration of extraneous issues, of irrelevant evidence, . . . and to assure to the litigants a fair and impartial trial. An omission by court or counsel to discharge this duty, or a persistent violation of it, is a fatal error. . . ." Here it is questionable whether even an immediate admonishment by the court to the jury, followed by a specific instruction, could have cured the error (see United States v. Schwartz, 325 F.2d 355, 358 (3d Cir. 1963)). However, only a general instruction was given to the effect that "statements and arguments of counsel . . . are not evidence in the case . . . ." (RT 351). Such an instruction was insufficient to neutralize



the prosecutor's misconduct. (See Robinson v. United States, 32 F.2d 505, 508, 510 (8th Cir. 1928).) As no proper warning was given the jurors, they were allowed to consider the case inclusive of the prosecutor's improper statements without benefit of the only action that might have minimized the prejudicial effects of the prosecutor's misconduct.

B. The Prosecutor Violated the Fifth Amendment Protections Afforded Persons Accused of Crimes by Drawing the Attention of the Jury to Appellant's Silence.

In his closing argument the United States Attorney twice referred to the appellant's silence, his failure to disclose information related to the offenses charged (RT 288-89). His tactics unconstitutionally called attention to the appellant's decision to remain silent.

The prosecutor first described the process by which the case came to trial and in particular the process of obtaining a grand jury indictment. He said that the government presented its evidence to the grand jurors, but that "they don't hear the other side because the defendant doesn't have to do anything. He doesn't come to the Grand Jury, he doesn't want to come to the Grand Jury." (RT 288.)

Moments later the prosecutor discussed the incompleteness of the statements obtained by the six FBI agents from appellant in the course of their interrogation of him. After quoting the statements made by appellant to the agents, he went on to say, "[M]r. Geeter was never again interviewed





by the F.B.I. He couldn't. He was a criminal defendant; the lawyer doesn't permit him to be interviewed. He can't be interviewed, so we didn't know anything more about this case than what he told us as far as he was concerned. He was entitled to see what our evidence would look like, as he did once before." (RT 289.)

The prosecutor's comments, particularly juxtaposed to one another as they were, could not help but lead the jury to the inference that disclosure of further information by appellant, either before the grand jury or in the interrogation process, would have been harmful to his cause, and hence that his silence was evidence of guilt. Although Griffin v. California, 380 U.S. 609, 85 Sup. Ct. 1229 (1965), does not directly apply to comments on non-trial silence (this case would be governed by general fifth amendment principles (Schmerber v. California, 384 U.S. 757, 765-66 n.9 (1966))), the prosecutor's comments, in the words of Griffin, cut "down on the privilege by making its assertion costly." (380 U.S. at 614.) As pointed out in Johnson v. United States, 318 U.S. 189, 196-97 (1943), "The allowance of the privilege would be a mockery of justice, if either party is to be affected injuriously by it."

The prosecutor's comments could have had no different effect on the jury than those made by counsel for the government in Carlin v. United States, 351 F.2d 618 (5th Cir. 1965). There the prosecutor said, "[A]ppellant here,





'has yet to say where he was - where he had gone, insofar as the record is concerned - it is silent.'" The Fifth Circuit held such comment to be clearly prejudicial and reversed the judgment below.

A situation analogous to the prosecutor's reference to appellant's non-appearance before the grand jury appears in the case of Stewart v. United States, 366 U.S. 1 (1961). In the course of the third trial of Willy Stewart for murder the prosecutor asked Stewart, who took the stand, "This is the first time you have gone on the stand, isn't it Willy?" (Id. at 4.) He received an answer that can only be described as unresponsive. The Court found that this question could have led to an inference on the part of the jury that the defendant had not testified at the prior judicial proceedings and hence to the inference that his silence was prompted by guilty knowledge. (Id. at 7-8.) The Supreme Court reversed the conviction on the basis of the single question by the prosecutor quoted above. The prosecutor in this case attempted the same tactic when he argued that the appellant presented no evidence to the judicial body which had heard the case presented before, the grand jury, because he did not want to come to the grand jury. Note further that this case presents not the single erroneous statement of the prosecutor, as in Stewart, which in itself requires reversal, but an error compounded by the reference to appellant's failure to disclose



additional information when interrogated.

Similar tactics were attempted by Texas prosecutors to secure a conviction, later vacated on a writ of habeas corpus by the United States District Court for the Northern District of Texas (Smith v. Decker, 270 F. Supp. 225 (1967)). In that case, the prosecutor took special pains to contrast the government's "full disclosure" with appellant's right, and apparent invocation of that right, to remain silent. The prosecutor did so by referring to the reference to the expected charge to the jury of no presumption of guilt because of a failure to testify. The federal court saw through the prosecution tactic and stated: "The clear and unmistakable import of the District Attorney's argument was 'we have brought you all the evidence at our command; the defendants sat silent when they could have spoken.'" (Id. at 226.)

The court held: "The great State of Texas need not be dependent upon such devices for convictions and there is no place in the administration of justice for them." (Id. at 226.) Even less can use of such tactics be sanctioned in the very federal courts charged with protection of federal rights. An examination of the prosecutor's argument in this case clearly demonstrates a use of the same tactic, and use of such a tactic requires reversal.

The constitutional rights protected by the fifth amendment are given zealous protection by the courts of this





nation. The fifth amendment right to remain silent in the face of a criminal accusation and trial is a right particularly deserving of protection because when violated in the manner presented by this case, the violation is apt to unfairly influence the jury's consideration of evidence in the case and it may affect the very validity of the fact-finding process. Unlike evidence arising from an unlawful search, for instance, drawing attention to appellant's silence may lead the jury to incorrect factual conclusions regarding the issue of guilt, because of its ignorance concerning factors other than guilt that might induce silence. Where the issue of guilt is close, as here, such a violation cannot but be held to be prejudicial error requiring reversal. It cannot be held "harmless beyond a reasonable doubt" (Chapman v. State of California, 386 U.S. 18, 24, 87 Sup. Ct. 824, 828 (1967)).

#### CONCLUSION

It is respectfully submitted that the misconduct of the prosecutor, including a violation of the constitutional rights afforded individuals accused of crimes, requires reversal of the judgment below.

Dated: May 10, 1968.

/s/ ROLAND E. BRANDEL

---

Roland E. Brandel  
Attorney for Appellant





CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ ROLAND E. BRANDEL  
Attorney



See Vol 3319  
No. 20822 ✓

**In the  
United States Court of Appeals  
For the Ninth Circuit**

INSURANCE COMPANY OF NORTH  
AMERICA, a corporation,

*Appellant,*

*v.*

THOMAS J. THOMPSON,

*Appellee.*

*Appeal from the United States District Court  
for the District of Idaho  
Southern Division*

**PETITION FOR REHEARING**

FILED  
SEP 14 1967  
RICHARDS, HAGA & EBERLE  
711½ Bannock St.  
Boise, Idaho 83705  
*Attorneys for Appellant*



No. 20822

In the  
**United States Court of Appeals  
For the Ninth Circuit**

---

INSURANCE COMPANY OF NORTH  
AMERICA, a corporation,

*Appellant,*

*v.*

THOMAS J. THOMPSON,

*Appellee.*

---

*Appeal from the United States District Court  
for the District of Idaho  
Southern Division*

**PETITION FOR REHEARING**

---

RICHARDS, HAGA & EBERLE  
711½ Bannock St.  
Boise, Idaho 83705  
*Attorneys for Appellant*





## PETITION FOR REHEARING

COMES NOW The Appellant, Insurance Company of North America, and petitions this Honorable Court for a rehearing in this cause and from the decision of this Court of August 4, 1967, upon the following grounds:

1. The opinion erroneously omits considering the evidence on, and omits Appellant's defenses as to, the effect of Appellee's pre-existing infirmities and disease in relation to the September 9th injuries. Thereby the Court erroneously assumes the September 9 accident created a covered loss and only considers the question of the sufficiency of the evidence of disabilities from the February 21 event. The latter issue of Appellant's liability for any loss resulting from medical treatment was improper, absent the requisite prior determination on Appellant's defense that coverage under the policy never came into existence in the first instance on September 9. It is submitted that, while Appellant admits the conditions precedent to coverage ("... bodily injuries caused by accident...") existed, the Court must determine if the evidence was sufficient to establish an event of coverage ("... directly and independently . . ." and not excluded) wholly as of September 9. The Court should not have proceeded to the further question of whether the event of coverage led, after a year's time, to the subsequent loss insured against (total disability) without making the necessary prior determination. Appellant submits that such prior determination would have found the evidence of pre-existing infirmities and disease was uncontradicted. The injury to the cervical spine, after the first acute period immediately following the accident had passed, was wholly due to the pressure on

the cervical nerve caused by a decrease in the nerve root space caused by an old, hard, protruding cervical disc and the rather markedly osteophyte growth on the vertabrae, which disc and osteophyte were uncontradictedly almost entirely in existence prior to September 9, and only aggravated by the accident. The Court should also have considered in this preliminary determination that the cervical operation proceeded by increasing the space for the nerve, not by correcting anything caused by the accident, but by removing lamina so the old disc would not impinge on the nerve, and that the evidence was uncontradicted that the accident did not create any new condition in the neck, but merely aggravated the pre-existing condition.

2. The opinion, on page 5 thereof, erroneously deals with specifications of error 13, 14 and 15, by omitting, or misconstruing, Appellant's position that, not only was Instruction No. 18 erroneous, but there was no instruction given as to whether or not, at the time of the September 9 accident, a particular reaction to the myelogram could have been foreseen, so that it would not be an intervening cause breaking the chain of causation. Further, the opinion is in error in stating that there was no applicable Idaho law cited on this point. Appellant would urge that while Instruction 18 submitted to the jury the issue of whether the myelogram was a necessary medical procedure and the issue of whether the myelogram contributed to the Appellee's disability, it omitted submitting the necessary connecting link issue of whether the results of the myelogram could reasonably have been foreseen, or were a separate effective event. In *New York Life Insurance Co. vs. Wilson*, *supra*, the main issue was the "... ex-

traordinarily violent coughing . . . of the insured resulting unforeseeably from the routine administration of opiates . . .” (178 F.2d at 534), wherein this Court held such unforeseeable event was an accident in and of itself. It was the sole proximate cause, the active agent of an embolism being deemed to have been caused by the violent coughing and not a pre-existing condition. The *Wilson* case was subsequent to *Rauert vs. Loyalty Protective Insurance Company, supra* (also cited), wherein an operation followed an accidentally created hernia, after which strangulation of the bowel occurred due to a pre-existing infirmity and death from infection resulted. The instructions in that case required the loss to come from the original hernia accident, including the subsequent septicemia, “. . . without the intervention of any other independent force, . . .” (106 P.2d at 1016), and the case went off on the point that the policy only excepted disease, and did not except infirmity which was deemed the cause of the strangulation. Because the evidence is uncontradicted that the disability the Appellee now suffers arose after the September 9 accident from “. . . subsequent events in the course of his treatment which were untoward and unforeseen” (Dr. Burton, Tr. 125, lines 24-25), the opinion as stated erroneously deals with the specifications of error cited and fails to consider the Idaho law that an intervening, superseding cause is one which is “. . . unforeseen, unanticipated and not a probable consequence of the original negligence . . .” *Dewey vs. Keller*, 86 Idaho 506, 388 P.2d 996 (1964).

3. The opinion should be revised on the basis of the following facts which are material and substantive to



the matter, and which Appellant believes the Court has erroneously either omitted, misstated or misconstrued:

(a) The review of the evidence on page 5 of the opinion includes a statement of fact which is not supported in the record in any way. That is, that the "... disabling pains . . .", which could only refer to the pains in the lower extremities, resulted "... either from the September 9 fall *or* from adverse reaction . . ." to the February 21 event. It is uncontradicted in the record (Tr. references, Appellant's brief, page 11) that Appellee had no complaints concerning his lower extremities after the September 9 fall until the event of February 21. The same is admitted by Appellee's brief, pages 4 and 5. The evidence by Appellee's two doctors was that the Appellee's major disability included to some degree as contributing causes the injuries resulting from both September 9 and February 21 events, as well as pre-existing disabilities, and not that one or the other event caused the disabling pain.

(b) The opinion omits the material, uncontradicted fact that the substantial and well developed osteophyte growth and hard disc protrusion at the C-7th level existed prior to the September 9 accident (Dr. Burton, Tr. 154, lines 1-4; Dr. Kiefer, Tr. 301, lines 1-6; Dr. Shaw, Tr. 205, lines 23-25; Dr. Raaf, Tr. 270 (4), and that the osteophyte and disc protrusion were merely aggravated by the September 9 accident (Dr. Kiefer, Tr. 301, lines 7-8; Dr. Raaf, Tr. 369, lines 1-4, Tr. 373, lines 12-16; Dr. Shaw, Tr. 206, lines 3-8).

(c) The opinion omits the material, uncontradicted fact that the cervical disability was substantially cured by the operation of February 28 by removal of sufficient pre-existing osteophyte to decompress the nerve from the pre-existing hard disc protrusion (Dr. Kiefer, Tr. 297, lines 1-13), and any residual disability in the cervical spine by itself would not prevent Appellee from doing his work. (Dr. Burton, Tr. 151, lines 21-23; Dr. Shaw, Tr. 205, lines 15-18; Dr. Kiefer, Tr. 307, lines 18-20).

(d) The statement of facts on page 2 of the opinion is erroneous in stating the occurrence of February 21. The evidence was uncontradicted that the Appellee's pain arose, not with any difficulty in arising, but only after stepping out of bed onto the floor, and the opinion omits the time sequence of approximately two hours after the myelogram when the event occurred. This point is vital, in that the evidence is uncontradicted that inflammation necessary to create arachnoiditis from the dye in the myelogram could not occur in such a short time, and, together with the fact of standing up causing the pain, it leads to the alleged differential diagnosis of a cause related to the pre-existing lumbar fusion.

(e) The statement of the coverage of the policy is erroneous in that the words "against specified loss described . . ." is omitted from the opinion. Such omission is material error in that the point is essential to indicate the limited coverage of the policy and is determinative of the burden of proof as the courts have determined it between policies with general coverages containing exceptions, and policies of extremely limit-

ed coverage. In the latter, which is presently before the Court, the burden is entirely upon the plaintiff to bring himself within the coverage, which coverage is defined as avoiding the exclusions which are the limiting portions of the policy.

(f) The coverage of the policy is likewise erroneously stated on page 2 of the opinion by the omission of the words "from any one or more of the following," and by the omission of the words ". . . illness, disease . . ." . The limitation of the issue of the exclusion only to the word "bodily infirmity" is material error, because of the distinction made in the Idaho case of *Rauert vs. Loyal Protective Insurance Co., supra*, between infirmity and disease. Because the evidence is uncontradicted in this case that, among other things, the Appellee was suffering from advanced deafness, pulmonary fibrosis, chronic bronchitis, emphysema, and some asthma, as well as arteriosclerosis, which had a definite effect on his ability to do heavy work, disease was a material item of the pre-existing condition relied on by Appellant.

(g) The coverage of the policy is also erroneously stated as to the permanent disability, by the omission from the opinion that the continuous total disability must arise from such injuries commencing within one year after the date of the accident, which point is material as a proof of loss could not be submitted until after the year had run from the disability commencement. As will appear in more detail in a later point the cervical spine injury could not have created the disability under the policy, due to its intimate relationship to pre-existing disease and infirmity, and assum



ing the myelogram disability is within the coverage of the policy, one year from February 21 had not run, and the proof of loss on its face did not claim it.

WHEREFORE, It is respectfully prayed that the Court grant a rehearing in the above entitled matter.

RICHARDS, HAGA & EBERLE

By \_\_\_\_\_

Of the Firm

Attorneys for Appellant

711½ Bannock Street

Boise, Idaho 83702

#### CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing in my judgment is well founded on the grounds set forth therein, and that the petition is not interposed for delay.

---

*Attorney For Appellant*

#### CERTIFICATE OF MAILING

I hereby certify that on the \_\_\_\_ day of September, 1967, I mailed a true and correct copy of the above and foregoing Petition for Rehearing to Roberts & Poole, 111 Broadway, Boise, Idaho, Attorneys for Appellee.

---

*Attorney for Appellant*



N O. 2 0 8 2 8

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

CLARENCE O. RIVERS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
CENTRAL DIVISION

---

MANUEL L. REAL,  
United States Attorney,  
JOHN K. VAN DE KAMP,  
Assistant U. S. Attorney,  
Chief, Criminal Division,  
ROBERT L. BROSIO,  
Assistant U. S. Attorney,  
Assistant Chief, Criminal Division,  
WILLIAM J. GARGARO, JR.,  
Assistant U. S. Attorney,

312 North Spring Street  
600 U. S. Court House  
Los Angeles, California 90012

**FILED**

JUN 10 1966

WM. B. LUCK, CLERK

Attorneys for Appellee,  
United States of America.



N O. 2 0 8 2 8

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

CLARENCE O. RIVERS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
CENTRAL DIVISION

---

MANUEL L. REAL,  
United States Attorney,  
JOHN K. VAN DE KAMP,  
Assistant U. S. Attorney,  
Chief, Criminal Division,  
ROBERT L. BROSIO,  
Assistant U. S. Attorney,  
Assistant Chief, Criminal Division,  
WILLIAM J. GARGARO, JR.,  
Assistant U. S. Attorney,

312 North Spring Street  
600 U. S. Court House  
Los Angeles, California 90012

Attorneys for Appellee,  
United States of America.





## TOPICAL INDEX

	<u>Page</u>
Table of Authorities	ii
I JURISDICTIONAL STATEMENT	1
II STATEMENT OF FACTS	2
III ARGUMENT	4
A. INSTRUCTION NO. 78 FROM CALJIC GIVEN BY THE COURT WAS NOT ERRONEOUS, IN THAT THE COURT FULLY INSTRUCTED AS TO THE EFFECT OF VOLUNTARY INTOXICATION UPON SPECIFIC INTENT.	4
B. THERE WAS NO ERROR BY REASON OF THE COURT'S REFUSAL TO GIVE APPEL- LANT'S SPECIAL INSTRUCTIONS NOS. 1 AND 2 RELATING TO THE GIVING OF BLOOD. THE COURT DID NOT REFUSE TO PERMIT TESTIMONY REGARDING THE GIVING OF BLOOD BY THE APPELLANT. THE COURT PROPERLY REFUSED TO ALLOW A CONTINUANCE DURING TRIAL TO PERMIT APPELLANT TO OBTAIN EXPERT TESTIMONY REGARDING THE GIVING OF BLOOD.	8
C. THE COURT OF APPEALS SHOULD NOT REVERSE THE TRIAL COURT FOR THE FAILURE OF LAW ENFORCEMENT OFFICERS TO PERFORM SOBRIETY TESTS AT THE TIME OF ARREST.	11
CONCLUSION	12
CERTIFICATE	13



N O. 2 0 8 2 8

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

CLARENCE O. RIVERS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

I

JURISDICTIONAL STATEMENT

The appellant, Clarence O. Rivers, was indicted on October 13, 1965 by the Federal Grand Jury for the Southern District of California, Central Division. <sup>1/</sup>

This one count indictment charged appellant with theft from an interstate shipment, in violation of Section 659, Title 18, of the United States Code.

The appellant was arraigned and entered a plea of Not Guilty as charged in the Indictment, on October 18, 1965 (C. T. 4).

Trial of this case before a jury began on November 1, 1965,

---

<sup>1/</sup> C. T. 2; C. T. refers to Clerk's Transcript of Proceedings.



before the Honorable Peirson M. Hall (C. T. 16). On November 2, 1965, the jury was charged and, after deliberation, returned a verdict of Guilty as charged in the Indictment (C. T. 17, 18).

Appellant was sentenced to imprisonment for a period of three years by the Honorable Peirson M. Hall, on November 15, 1965 (C. T. 20).

A timely notice of appeal was filed by the appellant on November 26, 1965 (C. T. 23).

The District Court had jurisdiction of the cause under Section 3231 of Title 28, United States Code.

This Court has jurisdiction under Sections 1291 and 1294, United States Code.

## II

### STATEMENT OF FACTS

On September 24, 1965, Henry Roybal, a truck driver for the Los Angeles Seattle Motor Express Company, stopped at the Zipp Extract Company on San Pedro Street to pick up a shipment of goods. After loading his truck, he went inside the building to make a telephone call. <sup>2/</sup> While dialing the phone, he saw, through the window, that his truck was beginning to roll (R. T. 32). Mr. Roybal came back outside and noticed that someone was sitting in the cab of the rolling vehicle (R. T. 23). He ran after the truck,

---

<sup>2/</sup> R. T. 21, 22, 23; R. T. refers to Reporter's Transcript of Proceedings.





caught it, opened the door on the passenger side, and grabbed the steering wheel, twisting the truck to the curb (R. T. 23), while the man behind the steering wheel was striking him and attempting to push him back out of the cab. This man behind the steering wheel was the appellant, Clarence O. Rivers (R. T. 24).

Roybal pulled the appellant out of the truck and held him down on the sidewalk, with the assistance of Clarence Ward, an employee of Zipp Extract who had followed Roybal from the building (R. T. 24, 47), while another man called the police (R. T. 24).

In regard to appellant's alleged intoxication at that time, the Government feels it significant that Rivers' speech was distinct, and that, according to Roybal, "He knew he was doing wrong because he wanted to get away" (R. T. 26).

Furthermore, when the police arrived, Rivers could stand without assistance (R. T. 49).

The police officer who arrived at the scene, Officer Robert A. Wooley, did not consider the appellant to be "drunk" (R. T. 55). Rather, Rivers was coherent and in control of his faculties (R. T. 55). Even though he was handcuffed, the appellant could stand and get into the police car unassisted (R. T. 57, 59).

Only the appellant, testifying in his own behalf, claimed that he was intoxicated at the time and did not remember the alleged offense. Rivers stated that he had been released from jail on the morning of the crime and had eaten no breakfast (R. T. 67). Rivers said he then went to the blood bank and sold a pint of blood (R. T. 67), using the four dollars he received from the blood bank to



purchase wine and vodka (R. T. 69). The last thing the appellant claimed to remember was obtaining a bottle of 7-Up and then awakening in the jailhouse (R. T. 70). He didn't remember anyone sitting upon him or striking anyone (R. T. 75), indeed, he did not even remember the incident as if it were a dream (R. T. 78).

Appellant admitted two prior convictions of the Dyer Act (R. T. 78).

### III

#### ARGUMENT

A. INSTRUCTION NO. 78 FROM CALJIC GIVEN BY THE COURT WAS NOT ERRONEOUS, IN THAT THE COURT FULLY INSTRUCTED AS TO THE EFFECT OF VOLUNTARY INTOXICATION UPON SPECIFIC INTENT.

---

Instruction No. 10.16 of Federal Jury Practice and Instructions, Mathes and Devitt, 1965, which appellant requested, and which the Court refused to give, reads as follows:

"10.16 Voluntary Intoxication

"Although intoxication or drunkenness alone is not a defense, the fact that a person may have been intoxicated at the time of the commission of a crime may negative the existence of specific intent.

"So, evidence that a defendant acted or failed to act while in a state of intoxication is to be considered in determining whether or not the defendant



acted, or failed to act, with specific intent, as charged.

"If the jury has a reasonable doubt from the evidence in the case whether, because of the degree of his intoxication, the mind of the accused was capable of forming, or did form, specific intent to commit the crime charged, the jury should acquit the accused."

The Government contends that there was no error regarding this in the court below, because Judge Hall instructed as to all of the essential elements contained in the Mathes and Devitt instruction.

Regarding specific intent, the Court instructed:

"With respect to crimes such as charged in this case, specific intent must be proved before there can be a conviction.

"Specific intent, as the term itself suggests, requires more than a mere general intent to engage in certain conduct.

"A person who knowingly does an act which the law forbids, or knowingly fails to do an act which the law requires, intending with evil motive or bad purpose either to disobey or to disregard the law, may be found to act with specific intent." (R. T. 109).





In regard to the effect of voluntary intoxication upon specific intent, the Court instructed as follows:

"The defendant here has raised the defense of intoxication. With respect to that you are instructed that the law provides that no act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition.

"But whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute any particular species or degree of crime the jury may take into consideration the fact that the accused was intoxicated at the time in determining the purpose, motive, or intent with which he committed the act." (R. T. 113).

And the Court fully instructed the jury regarding reasonable doubt:

"A defendant is presumed to be innocent at all stages of the proceedings until the evidence introduced on behalf of the Government shows him to be guilty beyond a reasonable doubt.

"And this rule applies to every material element of the offense charged." (R. T. 105).

"A conviction is justified only when such probabilities exclude all reasonable doubt, as the same has been defined to you. And without it being restated



or repeated, you are to understand that the requirement that a defendant's guilt be shown beyond a reasonable doubt is to be considered in connection with and as accompanying all the instructions which I give to you." (R. T. 105, 106).

"The burden is always upon the prosecution to prove both act and intent beyond a reasonable doubt." (R. T. 109).

Thus, the appellant was not harmed by the Court's refusal to give Mathes and Devitt Instruction No. 10.16, as requested by appellant, since the Court did include in its instructions all the material content of that Mathes and Devitt formula.

The fact that the Court declined to adopt the language of the counsel to the same effect as the instruction given regarding the effect of intoxication upon specific intent, affords no ground of exception.

Tucker v. United States, 151 U.S. 164, 170,  
14 S. Ct. 299, 301, 38 L. Ed. 112 (1893).



B. THERE WAS NO ERROR BY REASON OF THE COURT'S REFUSAL TO GIVE APPELLANT'S SPECIAL INSTRUCTIONS NOS. 1 AND 2 RELATING TO THE GIVING OF BLOOD. THE COURT DID NOT REFUSE TO PERMIT TESTIMONY REGARDING THE GIVING OF BLOOD BY THE APPELLANT. THE COURT PROPERLY REFUSED TO ALLOW A CONTINUANCE DURING TRIAL TO PERMIT APPELLANT TO OBTAIN EXPERT TESTIMONY REGARDING THE GIVING OF BLOOD.

---

The following are the special instructions which Appellant requested and were refused by the court:

Defendant's Special Instruction No. One

"Although loss of blood from a voluntary donation to a blood bank is not a defense, the fact that a person may have suffered after effects from the loss of blood at the time of a commission of a crime may negative the existence of requisite criminal intent.

"So, evidence that a defendant acted or failed to act while suffering after effects from the loss of blood is to be considered in determining whether or not the defendant acted or failed to act with specific intent as charged.

"And if it appears that the accused was suffering from the after effects from the loss of blood in such a degree that his mind was incapable of forming the specific intent required by law to commit the offense charged, the jury should acquit him." (C. T. 14).





Defendant's Special Instruction No. Two

"Evidence that the defendant had after effects from the loss of blood due to a voluntary donation of blood coupled with state of intoxication the defendant was in is to be considered in determining whether the defendant acted while in such a state that his mind was incapable of forming the specific intent required by law to commit the offense charged.

"If it should appear that the accused mind was in such a state of consciousness that his mind was incapable of forming the specific intent required by law to commit the offense charged, then the jury should acquit him. " (C. T. 15).

These instructions relate not to law, but to facts, and, therefore, were properly refused. The giving of blood was only one factor to be considered by the jury in determining whether the appellant was too intoxicated at the time of the crime to have formed the requisite specific intent.

If appellant was entitled to an instruction regarding the effect of blood loss upon alcoholic susceptibility, why wouldn't he likewise be entitled to an instruction regarding the effect of not having anything to eat, upon his alcoholic susceptibility? Or, going further, why wouldn't he be entitled to an instruction as to each bottle and kind of beverage he consumed?

These factors were all placed before the jury during the



course of trial and were available for use in determining the issue as to whether appellant was intoxicated in such degree as would negative the existence of specific intent.

The Court did not refuse to allow testimony regarding the giving of blood by appellant. Appellant stated on the witness stand that he had been released from jail on the morning of the alleged crime, and that he had gone to the blood bank and sold a pint of blood (R. T. 67).

Nor did the Court ever refuse to allow expert testimony to be received regarding the effect of the giving of blood upon specific intent. Rather, the Court pointed out:

"I will say in advance that these instructions here certainly would not be appropriate and proper unless there were some expert testimony here to support the proposition that the giving of blood would have some effect upon a person's intent." (R. T. 37).

Then, when appellant requested in the middle of trial to have a continuance in order to secure such expert testimony, the Court answered, "No. It should have been anticipated." (R. T. 40).

The Government contends that the Court was under no duty to grant a continuance in the middle of trial to permit the appellant to secure expert testimony where the appellant had ample opportunity prior to trial to do so.



C. THE COURT OF APPEALS SHOULD  
NOT REVERSE THE TRIAL COURT  
FOR THE FAILURE OF LAW EN-  
FORCEMENT OFFICERS TO PERFORM  
SOBRIETY TESTS AT THE TIME OF  
ARREST.

---

Appellant's final contention, unsupported by the citation of any authority, is that a denial of due process was worked in the failure of the arresting officers to perform sobriety tests upon the appellant.

It is not clear from the appellant's opening brief how the failure to give sobriety tests relates to any error of the trial court which the United States Court of Appeals for the Ninth Circuit is now being asked to cure. However, assuming that this argument is directed to some such error in the court below, it should be noted that there is nothing in the record which reflects a request by appellant for a sobriety test at the time of arrest.

Furthermore, it should be noted that appellant was not being arrested for a crime which included intoxication as one of its elements, rather, he was being arrested for stealing a truck.

It appears that appellant claims a constitutional right to a sobriety test on behalf of all suspected intoxicated defendants, regardless of whether they request such a test, and regardless of whether the crime for which they are arrested contains intoxication as one of its elements or as a possible defense.

There is not only no support to be found for the existence of such a right in any statutes or cases but the placing of such a





burden on the prosecution would be contrary to common sense.

### CONCLUSION

For the reasons set forth in this brief, the judgment below should be affirmed.

Respectfully submitted,

MANUEL L. REAL,  
United States Attorney,

JOHN K. VAN DE KAMP,  
Assistant U. S. Attorney,  
Chief, Criminal Division,

ROBERT L. BROSIO,  
Assistant U. S. Attorney,  
Assistant Chief, Criminal Division,

WILLIAM J. GARGARO, JR.,  
Assistant U. S. Attorney,

Attorneys for Appellee,  
United States of America.



## CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ William J. Gargaro, Jr.  
WILLIAM J. GARGARO, JR.



IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JAMES DAVID McCLAIN,  
Petitioner-Appellant,  
vs.  
LAWRENCE E. WILSON,  
Respondent-Appellee.

NO. 44690

APPELLEE'S BRIEF

Appeal from the United States  
District Court for the Northern  
District of California  
Southern Division

THOMAS C. LYNCH, Attorney General  
of the State of California

ROBERT R. GRANUCCI,  
Deputy Attorney General

FRANK C. DAMRELL, JR.,  
Deputy Attorney General

6000 State Building  
San Francisco, California 94102  
Telephone: 557-1339

Attorneys for Respondent-Appellee





## TOPICAL INDEX

	<u>Page</u>
JURISDICTION	1
STATEMENT OF THE CASE	1
Proceedings in the State Courts	2
Proceedings in the Federal Courts	3
APPELLANT'S CONTENTIONS	3
SUMMARY OF APPELLEE'S ARGUMENT	4
ARGUMENT	
I. THE QUESTION OF PROBABLE CAUSE TO ARREST IN THIS CASE DOES NOT RAISE GROUNDS FOR RELIEF ON HABEAS CORPUS.	4
II. THE <u>MAPP</u> RULE DOES NOT APPLY RETROACTIVELY.	5
CONCLUSION	6



TABLE OF CASES

	<u>Page</u>
<u>Armstrong v. Bannan,</u> 272 F.2d 577 at 580 (6th Cir. 1959)	5
<u>Curran v. Shuttleworth,</u> 180 F.2d 781 (6th Cir. 1950)	5
<u>Hampson v. Smith,</u> 153 F.2d 417 (9th Cir. 1946)	5
<u>Linkletter v. Walker,</u> 381 U.S. 618 (1965)	6
<u>Mapp v. Ohio,</u> 367 U.S. 643 (1961)	6



IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JAMES DAVID McCLAIN, )  
 )  
Petitioner-Appellant, )  
 )  
vs. ) NO. 44690  
 )  
LAWRENCE E. WILSON, )  
 )  
Respondent-Appellee. )  
 )  
 )  
 )

---

APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for a writ of habeas corpus was conferred by Title 28, United States Code section 2248. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause has been issued.

STATEMENT OF THE CASE

Appellant, petitioner below, has appealed from an order of the United States District Court for the Northern District of California, Southern Division, denying his application for a writ of habeas corpus.





A. Proceedings in the State Courts

On November 28, 1960, appellant James David McClain was convicted in the Superior Court of San Joaquin County upon his plea of not guilty, while represented by counsel, of the two felony counts of robbery in violation of California Penal Code section 211, and of assault with a deadly weapon in violation of California Penal Code section 245. He was sentenced to imprisonment in the State prison for the term prescribed by law, the robbery sentences to be served consecutively with one another and concurrently with the sentence for the assault.<sup>1/</sup>

Appellant did not appeal the above conviction. Rather, five years later, he filed a petition for writ of habeas corpus in the Superior Court of Marin County. (TR 6)<sup>2/</sup> That petition was denied on January 18, 1965. Thereafter, appellant filed a similar habeas corpus petition in the California Supreme Court which was denied without opinion on July 7, 1965 (TR 6). Substantially, the same factual and legal issues now presented to this Court were raised in those petitions.

---

<sup>1/</sup> Photocopies of the abstract of judgment and commitment of the San Joaquin Superior Court are appended to this brief.

<sup>2/</sup> "TR" refers to the transcript on appeal in this case.



## B. Proceedings in the Federal Courts

On January 7, 1966, appellant filed an application for a writ of habeas corpus in the United States District Court for the Northern District of California, Southern Division (TR 1). The Honorable Albert Wollenberg denied appellant's petition for a writ of habeas corpus by an order filed on January 13, 1966, without issuing an order to show cause (TR 28). The basis of the Court's order was that the rules announced in Escobedo v. Illinois, 378 U.S. 478 (1964) and Mapp v. Ohio, 367 U.S. 643 (1961) do not apply retrospectively. On February 16, 1966, Judge Wollenberg granted petitioner's application for a certificate of probable cause and for leave to appeal in forma pauperis.

A notice of appeal was filed by appellant on February 9, 1966 (TR 30).

In his petition to the District Court, appellant alleged the following: (1) He was not afforded effective aid of counsel either before or during trial, (2) Improper testimony of prior offenses was introduced during trial; (3) Appellant was denied his rights under the rule announced in the Escobedo case; (4) The fruit of an illegal search was used as evidence against him during trial; and (5) Appellant was subjected to an illegal arrest.

### APPELLANT'S CONTENTIONS

On this appeal, appellant contends (1) the



arresting officers lacked probable cause to apprehend appellant in that the officers possessed no arrest warrant or "information which would link him with the crime" (AOB 7), and (2) appellant was subjected to an illegal search in conjunction with his arrest. Appellant thus poses whether these allegations present grounds for relief on habeas corpus.

#### SUMMARY OF APPELLEE'S ARGUMENT

I. The question of probable cause to arrest in this case does not raise grounds for relief on habeas corpus.

II. The Mapp rule does not apply retroactively.

#### ARGUMENT

##### I

#### THE QUESTION OF PROBABLE CAUSE TO ARREST IN THIS CASE DOES NOT RAISE GROUNDS FOR RELIEF ON HABEAS CORPUS.

Appellant here contends his arrest was improper as the Berkeley police had no warrant for his arrest, but rather acted at the "request" of the Oakland police (AOB 7). Appellant further alleges he was held some 48 hours without knowledge of any charge. Appellant, however, wholly fails to demonstrate how these actions of the police affected his trial and conviction.

Assuming the arrest was illegal, there are no facts before this Court which indicate any resulting





impropriety at trial.

"Being held incommunicado without being informed of the nature of the charge, may have given the applicant some rights during this period of confinement, but it does not give him any rights to be released after a jury trial, conviction and sentence. Nowhere does he allege that the court lacked jurisdiction or that any of his federal constitutional rights were invaded during or after the trial. Nor is there any claim made that anything happened at this preliminary confinement which prejudiced him at the trial."

Armstrong v. Bannan, 272 F.2d 577 at 580 (6th Cir. 1959).

In short, the defects in the arrest procedure do not offer grounds for relief on habeas corpus when the defendant has been properly charged and convicted. Curran v. Shuttleworth, 180 F.2d 781 (6th Cir. 1950); Hampson v. Smith, 153 F.2d 417 (9th Cir. 1946).

Appellant's contention therefore is without merit.

## II

THE MAPP RULE DOES NOT APPLY RETROACTIVELY.

Appellant's contention as to the impropriety of the search is equally without merit. It should be noted the conviction of appellant was final on December 15, 1960,<sup>3/</sup>

---

<sup>3/</sup> Under California practice, a conviction becomes final ten days after imposition of sentence unless a notice of appeal is filed. California Rules of Court, Rule 31(a).



some time prior to the decision in Mapp v. Ohio, 367 U.S. 643 (1961). In Linkletter v. Walker, 381 U.S. 618 (1965), the Supreme Court held that the Mapp decision would not be applied retroactively to convictions which were final prior to the decision. Mapp was decided on June 19, 1961, subsequent to the finality of appellant's conviction. Consequently, appellant's allegation of an unlawful search and seizure does not state a ground for federal relief.

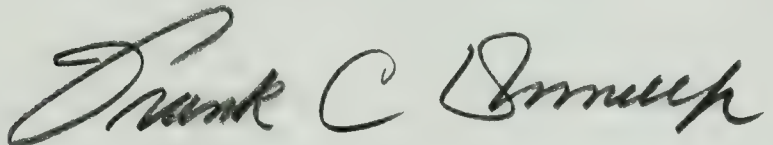
#### CONCLUSION

For the reasons stated above, it is respectfully submitted that the order of the District Court denying appellant's petition for a writ of habeas corpus should be affirmed.

DATED: October 6, 1966.

THOMAS C. LYNCH, Attorney General  
of California

ROBERT R. GRANUCCI,  
Deputy Attorney General



FRANK C. DAMRELL, JR.,  
Deputy Attorney General

Attorneys for Respondent-Appellee

FCD:sb  
CR-SF  
66-239

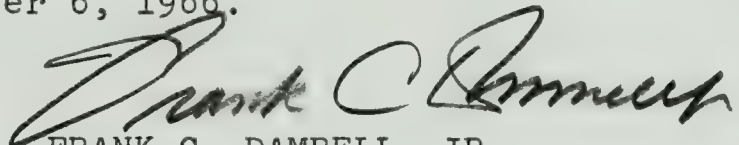


CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

DATED: San Francisco, California

October 6, 1966.

A handwritten signature in dark ink, appearing to read "Frank C. Damrell, Jr.", written in a cursive style.

FRANK C. DAMRELL, JR.  
Deputy Attorney General  
of the State of California





A P P E N D I X



of California

11

END OF VOLUME

(Commitment to State Prison as provided by Penal Code Section 12135)

Hon. E. J. Loomis  
(Judge of Superior Court)

Alvin L. Karpis  
Analyst: [illegible]

Ref: 11

2200 1903

Carroll for Dr. ...

20th day of November 1967

102

1931. 3. 27.

(1) 1/2, 1/3, 1/4, 1/5, 1/6, 1/7, 1/8, 1/9, 1/10, 1/11, 1/12, 1/13, 1/14, 1/15, 1/16, 1/17, 1/18, 1/19, 1/20, 1/21, 1/22, 1/23, 1/24, 1/25, 1/26, 1/27, 1/28, 1/29, 1/30, 1/31, 1/32, 1/33, 1/34, 1/35, 1/36, 1/37, 1/38, 1/39, 1/40, 1/41, 1/42, 1/43, 1/44, 1/45, 1/46, 1/47, 1/48, 1/49, 1/50, 1/51, 1/52, 1/53, 1/54, 1/55, 1/56, 1/57, 1/58, 1/59, 1/60, 1/61, 1/62, 1/63, 1/64, 1/65, 1/66, 1/67, 1/68, 1/69, 1/70, 1/71, 1/72, 1/73, 1/74, 1/75, 1/76, 1/77, 1/78, 1/79, 1/80, 1/81, 1/82, 1/83, 1/84, 1/85, 1/86, 1/87, 1/88, 1/89, 1/90, 1/91, 1/92, 1/93, 1/94, 1/95, 1/96, 1/97, 1/98, 1/99, 1/100, 1/101, 1/102, 1/103, 1/104, 1/105, 1/106, 1/107, 1/108, 1/109, 1/110, 1/111, 1/112, 1/113, 1/114, 1/115, 1/116, 1/117, 1/118, 1/119, 1/120, 1/121, 1/122, 1/123, 1/124, 1/125, 1/126, 1/127, 1/128, 1/129, 1/130, 1/131, 1/132, 1/133, 1/134, 1/135, 1/136, 1/137, 1/138, 1/139, 1/140, 1/141, 1/142, 1/143, 1/144, 1/145, 1/146, 1/147, 1/148, 1/149, 1/150, 1/151, 1/152, 1/153, 1/154, 1/155, 1/156, 1/157, 1/158, 1/159, 1/160, 1/161, 1/162, 1/163, 1/164, 1/165, 1/166, 1/167, 1/168, 1/169, 1/170, 1/171, 1/172, 1/173, 1/174, 1/175, 1/176, 1/177, 1/178, 1/179, 1/180, 1/181, 1/182, 1/183, 1/184, 1/185, 1/186, 1/187, 1/188, 1/189, 1/190, 1/191, 1/192, 1/193, 1/194, 1/195, 1/196, 1/197, 1/198, 1/199, 1/200, 1/201, 1/202, 1/203, 1/204, 1/205, 1/206, 1/207, 1/208, 1/209, 1/210, 1/211, 1/212, 1/213, 1/214, 1/215, 1/216, 1/217, 1/218, 1/219, 1/220, 1/221, 1/222, 1/223, 1/224, 1/225, 1/226, 1/227, 1/228, 1/229, 1/230, 1/231, 1/232, 1/233, 1/234, 1/235, 1/236, 1/237, 1/238, 1/239, 1/240, 1/241, 1/242, 1/243, 1/244, 1/245, 1/246, 1/247, 1/248, 1/249, 1/250, 1/251, 1/252, 1/253, 1/254, 1/255, 1/256, 1/257, 1/258, 1/259, 1/260, 1/261, 1/262, 1/263, 1/264, 1/265, 1/266, 1/267, 1/268, 1/269, 1/270, 1/271, 1/272, 1/273, 1/274, 1/275, 1/276, 1/277, 1/278, 1/279, 1/280, 1/281, 1/282, 1/283, 1/284, 1/285, 1/286, 1/287, 1/288, 1/289, 1/290, 1/291, 1/292, 1/293, 1/294, 1/295, 1/296, 1/297, 1/298, 1/299, 1/300, 1/301, 1/302, 1/303, 1/304, 1/305, 1/306, 1/307, 1/308, 1/309, 1/310, 1/311, 1/312, 1/313, 1/314, 1/315, 1/316, 1/317, 1/318, 1/319, 1/320, 1/321, 1/322, 1/323, 1/324, 1/325, 1/326, 1/327, 1/328, 1/329, 1/330, 1/331, 1/332, 1/333, 1/334, 1/335, 1/336, 1/337, 1/338, 1/339, 1/340, 1/341, 1/342, 1/343, 1/344, 1/345, 1/346, 1/347, 1/348, 1/349, 1/350, 1/351, 1/352, 1/353, 1/354, 1/355, 1/356, 1/357, 1/358, 1/359, 1/360, 1/361, 1/362, 1/363, 1/364, 1/365, 1/366, 1/367, 1/368, 1/369, 1/370, 1/371, 1/372, 1/373, 1/374, 1/375, 1/376, 1/377, 1/378, 1/379, 1/380, 1/381, 1/382, 1/383, 1/384, 1/385, 1/386, 1/387, 1/388, 1/389, 1/390, 1/391, 1/392, 1/393, 1/394, 1/395, 1/396, 1/397, 1/398, 1/399, 1/400, 1/401, 1/402, 1/403, 1/404, 1/405, 1/406, 1/407, 1/408, 1/409, 1/410, 1/411, 1/412, 1/413, 1/414, 1/415, 1/416, 1/417, 1/418, 1/419, 1/420, 1/421, 1/422, 1/423, 1/424, 1/425, 1/426, 1/427, 1/428, 1/429, 1/430, 1/431, 1/432, 1/433, 1/434, 1/435, 1/436, 1/437, 1/438, 1/439, 1/440, 1/441, 1/442, 1/443, 1/444, 1/445, 1/446, 1/447, 1/448, 1/449, 1/450, 1/451, 1/452, 1/453, 1/454, 1/455, 1/456, 1/457, 1/458, 1/459, 1/460, 1/461, 1/462, 1/463, 1/464, 1/465, 1/466, 1/467, 1/468, 1/469, 1/470, 1/471, 1/472, 1/473, 1/474, 1/475, 1/476, 1/477, 1/478, 1/479, 1/480, 1/481, 1/482, 1/483, 1/484, 1/485, 1/486, 1/487, 1/488, 1/489, 1/490, 1/491, 1/492, 1/493, 1/494, 1/495, 1/496, 1/497, 1/498, 1/499, 1/500, 1/501, 1/502, 1/503, 1/504, 1/505, 1/506, 1/507, 1/508, 1/509, 1/510, 1/511, 1/512, 1/513, 1/514, 1/515, 1/516, 1/517, 1/518, 1/519, 1/520, 1/521, 1/522, 1/523, 1/524, 1/525, 1/526, 1/527, 1/528, 1/529, 1/530, 1/531, 1/532, 1/533, 1/534, 1/535, 1/536, 1/537, 1/538, 1/539, 1/540, 1/541, 1/542, 1/543, 1/544, 1/545, 1/546, 1/547, 1/548, 1/549, 1/550, 1/551, 1/552, 1/553, 1/554, 1/555, 1/556, 1/557, 1/558, 1/559, 1/560, 1/561, 1/562, 1/563, 1/564, 1/565, 1/566, 1/567, 1/568, 1/569, 1/570, 1/571, 1/572, 1/573, 1/574, 1/575, 1/576, 1/577, 1/578, 1/579, 1/580, 1/581, 1/582, 1/583, 1/584, 1/585, 1/586, 1/587, 1/588, 1/589, 1/590, 1/591, 1/592, 1/593, 1/594, 1/595, 1/596, 1/597, 1/598, 1/599, 1/600, 1/60

Page 1 of 1

(1)  $\text{C}_{60}$  is a C<sub>60</sub> molecule, a fullerenes, a carbon cage molecule.

DATE	COUNTY AND STATE	CRIME	PUNISHMENT
1/1/11	County of Alameda State of California	Robbery of the Bank of the First National, a felony.	Fined (6) years probation; defendant to be confined in the Alameda County Jail for the first twelve (12) months of probationary period.

55

[illegible]









THE UNIVERSITY OF CHICAGO PRESS

2012.12.21

Let  $\alpha \in \mathbb{R}$ .

95-11117 This was in open Court some Assistant District Attorney Albert Morris and the defendant in person in the light of the present and with his counsel Edward Lee, this before the time fixed by the Court for argument on motion for new trial.

Leonard W. Neel, Official Court Reporter, was present and was directed to take down the proceedings in shorthand notes.

The motion for a new trial, made by defendant's counsel, was submitted to the Court on 10/20/47, and the Court having duly considered the same, IT IS ORDERED that motion for a new trial be, and it is hereby denied.

The defendant in question referred to the Education Officer for investigation, and to the provisions of Section 17 of the Penal Code of the Republic of Turkey, and requested that his sentence be pronounced accordingly.

[illegible]



of the Court denying said motion for a new trial; of defendant's waiver of removal to the Division of Prison for investigation pursuant to provisions of Section 111 of the Penal Code of the State of California, as amended, and of his request that his sentence be pronounced forthwith.

The Court then asked the defendant if he had any legal cause to show why judgment should not be pronounced against him and he replied that he had none. Where sufficient cause being alleged in accordance to the Court why judgment should not be pronounced, the Court then upon reading its judgment: That, whereas, the said defendant JAMES EARL RAY, has been duly convicted in this Court, by a jury, of the crime of a violation of Section 111 of the Penal Code of the State of California, to-wit: harboring, of the Alvin Karpis, a felony, Counts I and II and a violation of Section 112 of the Penal Code of the State of California, to-wit: harboring with a deadly weapon, a felony, Count III; and for the proper punishment of said defendant, to be 99 years, and further finding defendant was armed with a deadly weapon at the time of the commission of Counts I and II;

IT IS THE ORDER OF THE COURT, that the said defendant JAMES EARL RAY be imprisoned in the State Prison of the State of California for such period of time to be hereafter fixed as provided by law.

The sentence be pronounced herein as to Counts I and II to run consecutively, and as to Count III to run concurrently with Counts I and II.

The defendant was committed to the custody of the sheriff of the County of San Diego, and of said county he be delivered into the custody of the Division of Investigation of the California National Guard at San Diego, County of San Diego, California, forthwith.



IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FRANK GUYTAN FRIAS,  
Petitioner-Appellant,

v.

No. 20849 ✓

LAWRENCE E. WILSON, Warden,  
California State Prison,  
San Quentin, California,  
Respondent-Appellee.

BRIEF OF APPELLEE

THOMAS C. LYNCH, Attorney General  
of the State of California

ROBERT R. GRANUCCI,  
Deputy Attorney General

HORACE WHEATLEY,  
Deputy Attorney General

6000 State Building  
San Francisco, California  
Telephone: 557-2848

Attorneys for Appellee

FILED

JUN 27 1966

WM. B. LUCK, CLERK

10V 4 1966





1 TOPICAL INDEX

2 Page

3 JURISDICTION

1

4 STATEMENT OF THE CASE

1

5 SUMMARY OF APPELLEE'S ARGUMENT

3

6 ARGUMENT

7 APPELLANT'S CASE DOES NOT FALL WITHIN THE  
8 PURVIEW OF ESCOBEDO v. ILLINOIS, 378 U.S.  
478 (1964)

3

9 CONCLUSION

4

10  
11 TABLE OF CASES

12 Escobedo v. Illinois,  
13 378 U.S. 478 (1964)

2, 3, 4

14 Johnson v. New Jersey,  
34 U.S.L. Week 4592 (U.S. June 20, 1966)

4



1 IN THE UNITED STATES COURT OF APPEALS

2 FOR THE NINTH CIRCUIT

3  
4 FRANK GUYTAN FRIAS, }

5 Petitioner-Appellant, }

6 v. }

No. 20849

7 LAWRENCE E. WILSON, Warden, }  
California State Prison, }  
8 San Quentin, California, }

9 Respondent-Appellee. }

10  
11 BRIEF OF APPELLEE

12 JURISDICTION

13 The jurisdiction of the United States District  
14 Court to entertain appellant's petition for a writ of  
15 habeas corpus was conferred by Title 28, United States  
16 Code, section 2253, which makes a final order in a habeas  
17 corpus proceeding reviewable in the Court of Appeals when  
18 a certificate of probable cause has issued.

19 STATEMENT OF THE CASE

20 A. Proceedings in the state courts.

21 Appellant, Frank Guytan Frias, was convicted of  
22 violating section 11501 of the Health and Safety Code, to  
23 wit: furnishing a narcotic (heroin), after a trial by jury  
24 during which he was represented by counsel (CT 5-10).<sup>1/</sup>

25  
26 1. As hereinafter used, "CT" refers to the transcript of  
record filed in this Court, constituting the United States  
District Court Clerk's record on appeal.



1 On March 29, 1963, appellant was sentenced to state prison  
2 for the term prescribed by law (CT 12).

3 Appellant filed notice of appeal from the judgment  
4 of conviction on April 8, 1963 (CT 13), and on July 28, 1964,  
5 the District Court of Appeal of the State of California  
6 affirmed appellant's conviction.<sup>2/</sup> Appellant petitioned the  
7 Supreme Court of the State of California for a writ of habeas  
8 corpus on August 4, 1965 (CT 14-22), said writ being denied  
9 by that court on August 25, 1965 (CT 24). Substantially the  
10 same factual and legal issue of allegedly illegal interrogation  
11 presented to the District Court was raised in the petition  
12 for writ of habeas corpus in the California Supreme Court,  
13 though this issue was not raised in appellant's appeal to  
14 the District Court of Appeal of the State of California.

15 B. Proceedings in the federal courts.

16 On January 31, 1966, appellant filed an application  
17 for writ of habeas corpus in the United States District Court  
18 for the Northern District of California, Southern Division  
19 (CT 1-13). On January 28, 1966, the District Court dismissed  
20 the petition for a writ of habeas corpus filed by petitioner  
21 on the grounds that the decision of the Supreme Court in  
22 Escobedo v. Illinois, 378 U.S. 478 (1964), did not apply  
23 retroactively to affect petitioner's conviction which was  
24

25 2. A copy of the opinion of the District Court of Appeal  
26 will be lodged with this Court for its consideration on the  
date set for hearing this matter.





1 final prior to the Escobedo decision, and that petitioner's  
2 allegations were therefore devoid of merit (CT 35, 36).  
3 However, on February 25, 1966, the court, pursuant to Title  
4 28, United States Code, section 2253, certified that there  
5 was probable cause for petitioner to appeal from the court's  
6 order dismissing the petition for writ of habeas corpus, and  
7 the court also granted petitioner's motion for leave to  
8 appeal in forma pauperis, pursuant to Title 28, United States  
9 Code, section 1915 (CT 48).

10 SUMMARY OF APPELLEE'S ARGUMENT

11 Appellant's case does not fall within the purview  
12 of Escobedo v. Illinois, 378 U.S. 478 (1964).

13 ARGUMENT

14 Appellant does not argue that his statement, "I am  
15 damn sorry I ever sold you heroin . . . ," was other than  
16 voluntary. Rather appellant asserts that since he was "the  
17 direct object of a police investigation," he was entitled to  
18 be admonished of his constitutional right against self-  
19 incrimination (AOB 7).

20 Appellant has not alleged that he was in custody,  
21 that the police were carrying out a process of interrogations  
22 designed to elicit incriminating statements when he made  
23 the questioned statement, and that he had requested and  
24 been denied an opportunity to consult with counsel so as to  
25 bring him within the protection of Escobedo. And even had  
26 appellant made allegations identical to those made in



1 Escobedo, since appellant's trial was completed prior to  
2 June 22, 1964, the date on which Escobedo was decided,  
3 the exclusionary rule of Escobedo has no application to  
4 appellant's case. Johnson v. New Jersey, 34 U.S.L. Week  
5 4592 (U.S. June 20, 1966).

6 CONCLUSION

7 For the foregoing reasons, it is respectfully  
8 submitted that the order of the District Court denying  
9 appellant's petition for writ of habeas corpus be affirmed.

10 Dated: June 27, 1966.

11 THOMAS C. LYNCH, Attorney General  
12 of the State of California

13 ROBERT R. GRANUCCI,  
14 Deputy Attorney General

15 HORACE WHEATLEY,  
16 Deputy Attorney General

17 Attorneys for Respondent-Appellee  
18  
19

20 mhm  
CR-SF  
21 66-286



## CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

Dated: San Francisco, California.

June 27, 1966

HORACE WHEATLEY  
Deputy Attorney General  
of the State of California





IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

LONNIE JOHNSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
CENTRAL DIVISION

---

FILED

OCT 6 1967

WM. B. LUCK, CLERK

WM. MATTHEW BYRNE, JR.,  
United States Attorney,  
ROBERT L. BROSIO,  
Assistant U. S. Attorney,  
Chief, Criminal Division,  
RONALD S. MORROW,  
Assistant U. S. Attorney,

600 U. S. Court House  
312 North Spring Street  
Los Angeles, California 90012

Attorneys for Appellee,  
United States of America.

OCT 11 1967



IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

LONNIE JOHNSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
CENTRAL DIVISION

---

WM. MATTHEW BYRNE, JR.,  
United States Attorney,  
ROBERT L. BROSIO,  
Assistant U. S. Attorney,  
Chief, Criminal Division,  
RONALD S. MORROW,  
Assistant U. S. Attorney,

600 U. S. Court House  
312 North Spring Street  
Los Angeles, California 90012

Attorneys for Appellee,  
United States of America.



## TOPICAL INDEX

	<u>Page</u>
Table of Authorities	ii
I STATEMENT OF JURISDICTION	1
II STATUTES INVOLVED	2
III QUESTIONS PRESENTED	3
IV STATEMENT OF FACTS	3
V ARGUMENT	5
A. APPELLANT'S MATTER WAS NOT IN THE ACCUSATORY STAGE AT THE TIMES INTERVIEWED BY LAW EN- FORCEMENT OFFICIALS.	5
B. APPELLANT WAIVED ANY RIGHT HE MAY HAVE HAD TO A JACKSON v. <u>DENNO</u> , 378 U. S. 368 (1964) HEARING.	6
CONCLUSION	8
CERTIFICATE	9





## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Boles v. Stevenson, 379 U. S. 41 (1964)	7
Dickey v. United States, 332 F.2d 773 (9th Cir. 1964)	8
Escobedo v. Illinois, 378 U. S. 478 (1964)	3, 5, 6
Jackson v. Denno, 378 U. S. 368 (1964)	3, 6, 7
Minnesota v. Tahash, 364 F.2d 922 (8th Cir. 1966)	7
Phillips v. United States, 334 F.2d 589 (9th Cir. 1964)	8
Tucker v. United States, 375 F.2d 363 (8th Cir. 1967)	7
United States v. Taylor, 374 F.2d 753 (7th Cir. 1967)	7
<u>Constitution</u>	
United States Constitution:	
Sixth Amendment	7
<u>Statutes</u>	
Title 18, United States Code, §2	1, 3
Title 18, United States Code, §2113(a)	1, 2
Title 18, United States Code, §3231	2
Title 28, United States Code, §1291	2
Title 28, United States Code, §1294	2



IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

LONNIE JOHNSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

I

STATEMENT OF JURISDICTION

On May 6, 1964, appellant was indicted in four counts by the Federal Grand Jury for the Southern District of California, Central Division, for aiding and abetting the robbery of four national banks in violation of Title 18, United States Code, Sections 2113(a) and 2 [C. T. 2]. <sup>1/</sup> Following a jury trial before the Honorable Wm. M. Byrne, United States District Judge, from July 14, 1964, to July 15, 1964, appellant Lonnie Johnson was found guilty of all

---

<sup>1/</sup> "C. T." refers to Clerk's Transcript.



counts [C. T. 20].

Appellant was convicted and sentenced on August 3, 1964, to the custody of the Attorney General for eight years on each count, the sentences to run concurrently [C. T. 27].

There was filed for appellant, on February 4, 1966, a Notice of Appeal [C. T. 28]. The late notice of appeal was allowed by Judge Byrne in a written order [C. T. 29-33], based upon the finding that his (appellant's) attorney "defrauded him of the opportunity to appeal, by failing to file a notice of appeal" [C. T. 32, lines 9-11].

The District Court had jurisdiction under the provisions of Title 18, United States Code, Sections 2113(a) and 3231.

This Court has jurisdiction to review the judgment pursuant to Title 28, United States Code, Sections 1291 and 1294.

## II

### STATUTES INVOLVED

Title 18, United States Code, Sections 2113(a) provides:

"(a) Whoever, by force and violence, or by intimidation, takes or attempts to take, from the person or the presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; . . . .

\* \* \*





"Shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both.

Title 18, United States Code, Section 2, provides:

"Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

### III

#### QUESTIONS PRESENTED

1. Whether appellant was in custody within the meaning of Escobedo v. Illinois, 378 U.S. 478 (1964).

2. Whether appellant waived the right to have a Jackson v. Denno, 378 U.S. 368 (1964) hearing outside the presence of the jury.

### IV

#### STATEMENT OF FACTS

On the four days referred to in the indictment, July 16, 1963, July 18, 1963, July 22, 1963, and August 12, 1963, Leslie Lawrence, aka Paul Leon Lawrence, robbed four banks in the Los Angeles area [Ex. 1 found at C. T. 18-19]. All moneys taken were in the care and custody of banks which were national banks whose deposits were insured by the Federal Deposit Insurance Corporation [Ex. 1].



Appellant Lonnie Johnson, during the robberies was not seen by any employees of the subject banks in the bank building or on the premises owned by the bank.

Leslie Lawrence was arrested in October 1963 for the bank robberies. In that same month, appellant was taken to the Los Angeles Police Department for questioning in connection with the theft of certain screens from a shed [C. T. 74, 90]. While there he stated that he knew Lawrence. Appellant was questioned by FBI agents concerning the bank robberies but denied having helped Lawrence commit them [C. T. 53-54]. Thereafter in early April 1964, appellant was taken into custody in Bakersfield on a State charge of forgery [C. T. 94]. On April 12, 1964, he was transported to Los Angeles for questioning in connection with the instant bank robberies, since Leslie Lawrence had named him as his accomplice [C. T. 59-60, 94]. Appellant was questioned by FBI Agent Schlatter and Los Angeles Police Detective Rafferty and he admitted having driven Lawrence to two of the robbed banks [C. T. 44]. Later that day appellant was taken by Rafferty and Schlatter to the county jail for a confrontation with Lawrence, at which time appellant admitted to having driven Lawrence to and from all four of the instant bank robberies, and to having written hold-up notes [C. T. 45-50]. On April 14, 1964, appellant was again interviewed by FBI agents regarding the bank robberies and made similar admissions [C. T. 50-52].

The agents testified that on all occasions when they questioned appellant, they warned him of his constitutional rights, e. g., to



remain silent and to have counsel [C. T. 41, 43-44, 54, 78]. They stated that at no point did appellant request counsel [C. T. 41, 44, 62].

Appellant testified that he asked for counsel on April 12, 1964 but was told, "You will get one later" [C. T. 95-96]. He denied having made admissions concerning the bank robberies [C. T. 97-98, 101-102].

## V

### ARGUMENT

#### A. APPELLANT'S MATTER WAS NOT IN THE ACCUSATORY STAGE AT THE TIMES INTERVIEWED BY LAW ENFORCEMENT OFFICIALS.

---

When appellant was questioned relative to the instant bank robberies, and he admitted his participation, the case was not in the accusatory stage within the rule of Escobedo v. Illinois, 378 U. S. 478 (1964). While he was in physical custody at the time of his questioning, it was for an unrelated crime [C. T. 94]. Up until the date of April 12, 1964, there was nothing to link appellant to the robberies other than uncorroborated information received from Lawrence [C. T. 58]. The investigation was, objectively, in the investigation stage, and, therefore, the rule of Escobedo did not apply.





B. APPELLANT WAIVED ANY RIGHT HE  
MAY HAVE HAD TO A JACKSON v.  
DENNO, 378 U. S. 368 (1964) HEARING.

---

The trial in the present case commenced on July 14, 1964, soon after the decision in Escobedo v. Illinois, 378 U. S. 478 (June 22, 1964).

At the beginning of the testimony of FBI Agent Schlatter, defense counsel, at the point where Schlatter was about to go into conversations with appellant, raised an objection [C. T. 19]. At the bench, and outside the hearing of the jury, counsel for the defendant asked for a hearing, before the judge alone, to question the officers relative to whether or not appellant was denied counsel within the rule of the Escobedo case [C. T. 20].

However, a short time after the request, defense counsel stated [C. T. 23]:

"From my reading of the Escobedo case, it prompts me to say that my objection at this time might be somewhat earlier than I should make it, because I don't know exactly what the testimony of Officer Schlatter will be . . . ."

After some further discussion between counsel and the Court concerning, inter alia, the meaning of Escobedo, Judge Byrne went on, at C. T. 27-28 to agree with defense counsel's withdrawal of the request for a hearing and stated:

"Perhaps you are right when you said, in



your initial statement, that perhaps this might not be the time to make the objection. We will see what the testimony is, see what is testified to by the officers, and the testimony of the defendant himself."

After the testimony of the law enforcement personnel was admitted, and both sides rested, the defense, at C. T. 147, moved to exclude their testimony on the ground that appellant had been denied counsel. The motion was denied [C. T. 148].

The cases indicate that, like most rights, the right to a Jackson v. Denno, 378 U.S. 368 (1964), hearing may be waived. See Minnesota v. Tahash, 364 F.2d 922, 927 (8th Cir. 1966); United States v. Taylor, 374 F.2d 753, 756 (7th Cir. 1967). Here the defense made a request, withdrew it, and the Court accepted the withdrawal of the request. The record thus shows a classic waiver of a known right. <sup>2/</sup>

Moreover, even if the Court were to find that there was no waiver and that a hearing was required, it is submitted that a remand for the purpose of determining whether appellant was denied counsel during the interviews would be the proper remedy. Boles v. Stevenson, 379 U.S. 41 (1964). Although the judge did not submit to the jury the precise question whether the appellant had requested

---

<sup>2/</sup> We do not contend that the right to a Jackson v. Denno hearing was unavailable because the claim of inadmissibility of the confessions was based on an alleged failure to accord the defendant a Sixth Amendment right. See Boles v. Stevenson, 379 U.S. 41 (1964); Tucker v. United States, 375 F.2d 363, 367 (8th Cir. 1967).



and been refused counsel, <sup>3/</sup> the record shows no objection to the instructions given. In fact, at C. T. 180, appellant's counsel stated there was no objection "to any instructions given or the omission of any instructions". In these circumstances appellant cannot object to the failure of the judge to instruct the jury to determine whether appellant was denied counsel following a request. See, e. g., Dickey v. United States, 332 F.2d 773, 778 (9th Cir. 1964), Phillips v. United States, 334 F.2d 589 (9th Cir. 1964).

### CONCLUSION

For the above stated reasons, the Judgment of Conviction should stand.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,  
United States Attorney,

ROBERT L. BROSIO,  
Assistant U. S. Attorney,  
Chief, Criminal Division,

RONALD S. MORROW,  
Assistant U. S. Attorney,

Attorneys for Appellee,  
United States of America.

---

<sup>3/</sup> The judge did charge that an admission must be found beyond a reasonable doubt to have been made "voluntarily and understandingly" [C. T. 171-172].





CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Ronald S. Morrow  
RONALD S. MORROW



IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JEWELL C. BEASLEY,

Petitioner-Appellant,

v.

LAWRENCE E. WILSON, Warden,  
California State Prison,  
San Quentin, California,

Respondent-Appellee.

No. 20857 ✓

BRIEF OF APPELLEE

THOMAS C. LYNCH, Attorney General  
of the State of California

EDWARD P. O'BRIEN,  
Deputy Attorney General

6000 State Building  
San Francisco, California  
Telephone: 557-0409

Attorneys for Respondent-Appellee

**FILED**

SEP 22 1966

WM. B. LUCK, CLERK



TOPICAL INDEX

	<u>Page</u>
3 JURISDICTION	1
4 STATEMENT OF THE CASE	
5       A. Proceedings in the state courts.	1
6       B. Proceedings in the federal courts.	2
7 STATEMENT OF FACTS	3
8 SUMMARY OF APPELLEE'S ARGUMENT	5
9 ARGUMENT	
10       I. APPELLANT KNOWINGLY AND INTELLIGENTLY	
11         WAIVED HIS CONSTITUTIONAL RIGHT TO	
COUNSEL	6
12 CONCLUSION	13
13 CERTIFICATE OF COUNSEL	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	



TABLE OF CASES

	<u>Page</u>
1	
2	
3 Aiken v. United States, 296 F.2d 604 (4th Cir. 1961)	11, 12
4 Davis v. United States, 123 F.Supp. 407 (D.Minn. 1954), 5 aff'd. 226 F.2d 834 (8th Cir. 1955), 6 cert. denied 351 U.S. 912 (1956)	9
7 Escobedo v. Illinois, 378 U.S. 478 (1964)	3
8 Johnson v. United States, 9 318 F.2d 855 (8th Cir. 1963)	12
10 Johnson v. Zerbst, 304 U.S. 458 (1938)	6, 8-9
11 Moore v. Michigan, 12 355 U.S. 155 (1957)	9
13 Shelton v. United States, 242 F.2d 101 (5th Cir. 1957)	11, 12
14 Twining v. United States, 15 321 F.2d 432 (5th Cir. 1963)	10
16 United States v. Diggs, 304 F.2d 929 (6th Cir. 1962)	11
17 United States v. Lester, 18 247 F.2d 496 (2d Cir. 1957)	10, 11, 12
19 United States v. Pink, 315 U.S. 203 (1942)	10
20 United States v. Redfield, 21 197 F.Supp. 559 (D.Nev. 1961), aff'd. per curiam, opinion adopted, 22 295 F.2d 249 (9th Cir. 1961), cert. denied 369 U.S. 803 (1962)	12
23 United States v. Smith, 24 337 F.2d 49 (4th Cir. 1964)	11
25 Von Moltke v. Gillies, 332 U.S. 708 (1947)	10-12
26	





TABLE OF CASES (Continued)

	<u>Page</u>
Watts v. United States, 273 F.2d 10 (9th Cir. 1959), cert. denied 362 U.S. 982 (1960)	9
Wilson v. Harris, 351 F.2d 840 (9th Cir. 1965)	6
<u>TEXTS, STATUTES AND AUTHORITIES</u>	
Government Code § 69955	4
Penal Code § 987	9
United States Code Title 28, § 2253	1
Federal Rules of Criminal Procedure Rule 11	10



1 IN THE UNITED STATES COURT OF APPEALS

2 FOR THE NINTH CIRCUIT

3  
4 JEWELL C. BEASLEY, )

5 Petitioner-Appellant, )

6 v. )

No. 20857

7 LAWRENCE E. WILSON, Warden, )

California State Prison, )

8 San Quentin, California, )

9 Respondent-Appellee. )

10  
11 BRIEF OF APPELLEE

12  
13 JURISDICTION

14 The jurisdiction of the United States District  
15 Court to entertain appellant's petition for a writ of  
16 habeas corpus is conferred by Title 28 United States Code  
17 section 2253, which makes a final order in a habeas corpus  
18 proceeding reviewable in the Court of Appeals when a  
19 certificate of probable cause has issued.

20 STATEMENT OF THE CASE

21 A. Proceedings in the state courts.

22 Appellant, Jewell C. Beasley, was convicted upon  
23 his plea of guilty in the Superior Court of San Diego  
24 County of robbery in the first degree and on July 13, 1949,  
25 was sentenced to the state prison for the time prescribed  
26 by law.



1 No appeal was taken from this judgment of conviction.

2 An application for a writ of habeas corpus was  
3 denied by the California Supreme Court on July 7, 1965.

4 B. Proceedings in the federal courts.

5 On August 5, 1965, sixteen years after his  
6 conviction, appellant filed an application for a writ of  
7 habeas corpus in the United States District Court, Northern  
8 District of California, Southern Division. On that same  
9 date, an Order to Show Cause was issued. Appellee, respondent  
10 below, filed a Return to the Order to Show Cause on August 25,  
11 1965. Appellant filed a Traverse to the Return to Order to  
12 Show Cause on September 3, 1965. On October 27, 1965, the  
13 District Court appointed counsel to represent appellant in  
14 further proceedings before the court.

15 The District Court thereafter ordered that an  
16 evidentiary hearing be held and the hearing was conducted  
17 before the District Court on November 8, 1965 and January 5,  
18 1966. Thereafter, additional points and authorities were  
19 filed by the respective parties.

20 On February 7, 1966, the District Court denied the  
21 petition for writ of habeas corpus, discharged the Order to  
22 Show Cause and dismissed the proceedings. The District  
23 Court concluded that appellant's plea of guilty was not the  
24 product of coercion but rather the result of a considered  
25 choice as he had previously been identified by the robbery  
26 victim as the perpetrator and had been further implicated





1 by his codefendant. The court also determined that  
2 petitioner's claim that he made certain incriminating  
3 statements prior to being advised of his constitutional  
4 rights was foreclosed since the United States Supreme  
5 Court's ruling in Escobedo v. Illinois, 378 U.S. 478 (1964)  
6 could not be retrospectively applied. Finally, the court  
7 concluded that appellant was advised of his right to counsel  
8 during the proceedings against him in the courts of the  
9 State of California and that appellant knowingly and  
10 intelligently waived that right.

11 On February 25, 1966 a certificate of probable  
12 cause was issued by the Honorable Albert C. Wollenberg,  
13 Judge of the United States District Court for the Northern  
14 District of California, Southern Division. On March 2,  
15 1966, a notice of appeal was filed.

16 STATEMENT OF FACTS

17 A felony complaint charging appellant with  
18 robbery was filed in the Municipal Court of the San Diego  
19 Judicial District on June 1, 1949. On June 3, 1949, appellant  
20 was arraigned on the complaint and was advised of his rights.  
21 Appellant was arraigned on the complaint and at that time  
22 the court advised appellant of his right to be represented  
23 by a lawyer at all stages of the proceedings. Appellant  
24 affirmatively stated he did not wish to be represented by  
25 counsel. Appellant was released on bail a few days after his  
26 arrest and remained at large until the day of his sentencing,



1 July 14, 1949.

2           On June 21, 1949, appellant appeared before the  
3 Superior Court of San Diego County for arraignment on the  
4 information filed subsequent to the proceedings in the  
5 Municipal Court. The reporter's notes of the proceedings  
6 in Superior Court were destroyed after ten years (Govt.  
7 Code § 69955). At that time the trial judge informed  
8 appellant of his right to be represented by counsel. Judge  
9 William A. Glenn of the San Diego Superior Court presided  
10 at the arraignment and sentence. of appellant and testified  
11 as to his customary practice and procedure which he followed  
12 at that time. It was established by Judge Glenn that it  
13 was his invariable practice to advise a defendant appearing  
14 in a criminal case that he was entitled to be represented  
15 by an attorney at all stages of the proceedings, that if the  
16 defendant was without funds and wished the assistance of  
17 counsel the court would appoint an attorney to serve without  
18 charge. The defendant was given a copy of the information  
19 and a transcript of the proceedings held at the preliminary  
20 hearing and was advised that he could have witnesses summoned  
21 in his behalf and that he could confront and cross-examine  
22 the witnesses called by the State. The judge carefully  
23 interrogated every defendant to determine that the defendant  
24 knew of his right to counsel and that the defendant was  
25 making a knowing and intelligent waiver of his right to  
26 counsel and that he determined this from all the circumstances



1 including the defendant's attitude, demeanor and apparent  
2 understanding of his explanation. If the defendant indicated  
3 that he wished to proceed without counsel and enter a plea  
4 of guilty Judge Glenn then informed the defendant of the  
5 consequences of such a plea. In this case, Judge Glenn  
6 stated that he would specifically inform the appellant  
7 Beasley that the crime of robbery was punishable in the  
8 state prison for a term of five years to life. Furthermore,  
9 at this time Judge Glenn had before him and had reviewed  
10 the transcript of the preliminary hearing when appellant  
11 had admitted his participation in the robbery. Judge Glenn  
12 thereafter accepted appellant's plea of guilty. The appellant  
13 again appeared before the trial court a few weeks later on  
14 July 13, 1949 for sentencing. After having read and  
15 considered the probation report the court denied appellant's  
16 application for bail and asked appellant why he had committed  
17 the crime. Appellant replied that it was because of his  
18 drinking. The court then asked appellant if he had any legal  
19 cause to show why judgment should not be pronounced against  
20 him. The appellant answered, "No, sir."

21 SUMMARY OF APPELLEE'S ARGUMENT

22 Since the appellant in his brief on appeal  
23 has abandoned his trial court claims that his judgment  
24 of conviction was the result of a coerced plea of guilty  
25 and also his claim that his conviction was the result  
26 of illegally obtained statements, appellee will confine





1 his argument to appellant's sole remaining contention,  
2 that is, that he was deprived of his right to counsel  
3 in the state court proceedings.

4  
5 I

6 APPELLANT KNOWINGLY AND INTELLIGENTLY WAIVED  
7 HIS CONSTITUTIONAL RIGHT TO COUNSEL

8 The classic definition of the test to be  
9 applied in determining whether an effective waiver of  
10 a constitutional right has occurred is contained in  
11 Johnson v. Zerbst, 304 U.S. 458 (1938). A waiver is  
12 ordinarily an intentional relinquishment or abandonment  
13 of a known right or privilege. This determination of  
14 whether there has been an intelligent waiver of the  
15 right to counsel must depend, in each case, upon the  
16 particular facts and circumstances surrounding that  
17 case, including the background, experience and conduct  
18 of the accused. The application of this flexible  
19 standard was recently reaffirmed by this Court in Wilson  
20 v. Harris, 351 F.2d 840 (9th Cir. 1965).

21 The following factors relevant to determining  
22 the issue of competent waiver were established in the  
23 District Court:

24 Appellant was a literate adult twenty-one years  
25 of age at the time of his conviction. He was gainfully  
26 employed as a painter at a salary of about \$76 a week.  
He was released on bail shortly after his arrest and





1 remained on bail throughout the various proceedings until  
2 the day sentence was imposed.

3           On June 3, 1949, when initially brought into  
4 court for arraignment on the complaint charging him with  
5 robbery appellant was informed of his right to be  
6 represented by counsel at all stages of the proceedings.  
7 Appellant affirmatively stated that he did not wish to  
8 be represented by counsel. Appellant thereafter testified  
9 and, while admitting his participation in the robbery, he  
10 attempted to place the primary culpability on his companion,  
11 Sgt. Wheatley. Thus, the evidence clearly supports the  
12 finding of Municipal Judge Phillip Smith of the San Diego  
13 Municipal Court that the appellant was aware of his right  
14 to legal representation and knowingly and intelligently  
15 waived that right at the preliminary hearing.

16           Thereafter on June 21, 1949, appellant appeared  
17 for arraignment in the San Diego Superior Court before  
18 Judge William Glenn. Since the transcript of this  
19 fifteen-year-old proceeding had been destroyed, Judge  
20 Glenn testified as to his practice and procedure at that  
21 time. The trial Judge's testimony established that upon  
22 his arraignment in Superior Court, a defendant was given  
23 a copy of the information and the preliminary hearing  
24 transcript; was advised that he could have witnesses summoned  
25 in his behalf and that he could confront and cross-examine  
26 witnesses called by the state; was advised that he was



1 entitled to be represented by an attorney at all stages of  
2 the proceedings and that if the defendant was without  
3 funds and wished the assistance of counsel the court  
4 would appoint an attorney. It was established by Judge  
5 Glenn that he carefully interrogated every defendant to  
6 determine whether or not he was making an knowing and  
7 intelligent waiver of his right to counsel. If the  
8 defendant indicated he did not desire counsel and wished  
9 to plead guilty, Judge Glenn informed him of the  
10 consequences of such a plea, that is, that he would have  
11 specifically informed the appellant that the crime of robbery  
12 was punishable in the state prison for a term of five years  
13 to life. At the time of accepting the plea, Judge Glenn  
14 had before him and had reviewed the transcript of the  
15 preliminary hearing wherein appellant admitted his  
16 participation in the robbery.

17         Examination of the above particular facts and  
18 circumstances surrounding appellant's entry of a guilty  
19 plea compels the determination that appellant intentionally  
20 relinquished the right to counsel, which right was known  
21 to him at the time of his plea.

22         Appellant is attacking the validity of a conviction  
23 based upon his plea of guilty entered in the San Diego County  
24 Superior Court over sixteen years ago. A judgment of  
25 conviction based upon such a plea of guilty is not likely  
26 to be set aside. See Johnson v. Zerbst, supra at 468. In



1 attacking his conviction on the basis of denial of his  
2 constitutional right to counsel, appellant has the burden  
3 of proving such denial by a preponderance of the evidence.  
4 See Johnson v. Zerbst, supra at 468-69; Moore v. Michigan,  
5 355 U.S. 155, 161 (1957); Watts v. United States, 273 F.2d  
6 10, 11-12 (9th Cir. 1959), cert. denied, 362 U.S. 982 (1960).  
7 It must not be forgotten that the official state record  
8 here indicates that appellant was duly arraigned in the  
9 Superior Court. In properly arraigning appellant, the  
10 Superior Court, being bound to follow the law of this  
11 state, California Penal Code section 987, necessarily  
12 determined that appellant competently, knowingly and intel-  
13 ligently waived counsel.

14           Two state court judges found in court proceedings  
15 sixteen years ago that appellant then competently waived his  
16 right to counsel. Judge Glenn was in a position to observe  
17 appellant and to evaluate his responses. Certainly, "the  
18 demeanor, the facial expression and the responses made by the  
19 accused soon may convincingly disclose to an experienced  
20 trial judge whether the accused is intelligently and  
21 understandingly waiving his constitutional right." Davis v.  
22 United States, 123 F.Supp. 407, 412 (D.Minn. 1954), aff'd.,  
23 226 F.2d 834 (8th Cir. 1955), cert. denied, 351 U.S. 912  
24 (1956). Appellant attempts to attack the sufficiency of  
25 the inquiry made by the state court concerning the possible  
26 defenses he might have to charges brought against him.







1 But there is no such constitutional formula which must be  
2 followed by a state trial judge in order to determine  
3 whether a criminal defendant has completely waived his right  
4 to counsel. See United States v. Lester, 247 F.2d 496, 499  
5 (2d Cir. 1957). Von Moltke v. Gillies, 332 U.S. 708 (1947),  
6 which is cited by appellant for this proposition, imposes  
7 no such checklist of inquiry on state courts.

8           The type of judicial inquiry which Mr. Justice  
9 Black outlined in Von Moltke as necessary for a valid  
10 waiver of counsel was subscribed to by only four justices  
11 of the Court. Of course, "lack of agreement by a majority  
12 of the Court on the principles of law involved prevents it  
13 from being an authoritative determination for other cases."  
14 See United States v. Pink, 315 U.S. 203, 216 (1942). More-  
15 over, the requisites discussed in Von Moltke have not, to  
16 appellee's knowledge, been adopted by either the United  
17 States Supreme Court or any Court of Appeals as an absolute  
18 constitutional standard against which any alleged waiver of  
19 counsel must be measured. See, e.g., Twining v. United  
20 States, 321 F.2d 432, 434-35 (5th Cir. 1963).

21           Significantly, Von Moltke involved a federal  
22 conviction to which Rule 11 of the Federal Rules of Criminal  
23 Procedure applied. Thus, Mr. Justice Black spoke of "the  
24 solemn duty of a federal judge." 332 U.S. at 722. And the  
25 Courts of Appeal apparently have understood the requirements  
26 discussed in Von Moltke to be inspired by Rule 11 and thus



1 limited to federal cases. See, e.g., United States v.  
2 Lester, 247 F.2d 496, 499-500 (2d Cir. 1957); Aiken v.  
3 United States, 296 F.2d 604, 606-07 (4th Cir. 1961); United  
4 States v. Smith, 337 F.2d 49, 55 (4th Cir. 1964); United  
5 States v. Diggs, 304 F.2d 929, 930 (6th Cir. 1962); Shelton  
6 v. United States, 242 F.2d 101, 112 (5th Cir. 1957).

7 Even though the standards discussed in Von Moltke  
8 may in fact furnish "certain guidelines for the District  
9 Courts," even in these courts "the ultimate issue is simply  
10 whether the accused knowingly and intelligently chose to  
11 waive counsel." United States v. Smith, supra at 55.

12 The trial judge in appellant's case advised him  
13 of his rights including the right to court-appointed counsel,  
14 inquired of his desire for counsel, and informed him of the  
15 nature of the charge and the punishment prescribed for the  
16 offense. Further the trial court as a result of being  
17 familiar with the transcript of the preliminary hearing was  
18 aware of the appellant's version of what had occurred and the  
19 circumstances in mitigation of the offense. With all of  
20 these facts before him and upon his observance of the  
21 appellant's answers and demeanor the judge concluded that  
22 appellant competently waived counsel. Thus, it would appear  
23 that the trial court's action was in essential compliance  
24 with the formula set forth in Von Moltke. Assuming that the  
25 formula described in Von Moltke was not followed in every  
26 last detail, such fact does not vitiate the determination



1 of waiver and render the proceedings unconstitutional. See  
2 Aiken v. United States, supra at 606-07; accord, Shelton v.  
3 United States, supra at 112; United States v. Lester, supra  
4 at 499.

5 Appellant did not indicate a desire for counsel  
6 and in fact distinctly declared his desire to proceed  
7 without counsel. The Constitution does not require  
8 that in criminal proceedings the services of an attorney be  
9 forced upon a defendant against his wishes. Von Moltke v.  
10 Gillies, 332 U.S. 708, 724 (1948); Johnson v. United States,  
11 318 F.2d 855, 856 (8th Cir. 1963); United States v. Redfield,  
12 197 F.Supp. 559 (D.Nev. 1961), aff'd per curiam, opinion  
13 adopted, 295 F.2d 249 (9th Cir. 1961), cert. denied, 369 U.S.  
14 803 (1962).

15 None of the compelling circumstances present  
16 in cases relied upon by appellant in his brief are present  
17 here. In the instant case, appellant was fully aware of  
18 the fact that he was entitled to counsel including court-  
19 appointed counsel. Here, appellant was not held in jail  
20 during the proceedings but rather was free on bail. Likewise  
21 appellant was aware of the consequences of rejecting legal  
22 advice and entering a plea of guilty, including the precise  
23 sentencing consequences. Appellant was truly informed of his  
24 rights and the nature of the charge against him and the  
25 evidence indicates his clear and consistent desire to plead  
26 guilty. There is nothing in the record to indicate appellant





1 was falsely advised, offered any inducement or coerced.  
2 On the contrary, he made his desire emphatically clear to the  
3 courts, to which he also indicated his guilt of the crime  
4 charged.

5 Appellant was not denied his constitutional right  
6 to counsel by the state courts, nor was he compelled to  
7 enter a plea without the advice of counsel. His conviction  
8 rests, therefore, upon a plea of guilty freely and voluntarily  
9 entered after being fully advised by the state courts of  
10 his right to counsel including his right to court-appointed  
11 counsel. Thus a consideration of the surrounding facts and  
12 circumstances compels the conclusion that he intelligently  
13 and understandingly rejected the court's offer of counsel.

14 CONCLUSION

15 For the reasons stated above, it is respectfully  
16 submitted that the order of the District Court denying  
17 appellant's petition for a writ of habeas corpus should  
18 be affirmed.

19 Dated: September 21, 1966.

20 THOMAS C. LYNCH, Attorney General  
21 of the State of California

22 

23 EDWARD P. O'BRIEN,  
24 Deputy Attorney General

25 Attorneys for Respondent-Appellee  
26





1                    CERTIFICATE OF COUNSEL

2                    I certify that in connection with the preparation  
3 of this brief, I have examined Rules 18 and 19 of the  
4 United States Court of Appeals for the Ninth Circuit  
5 and that in my opinion this brief is in full compliance  
6 with these rules.

7                    Dated: San Francisco, California

8                    September 21, 1966.

9                    

10                   EDWARD P. O'BRIEN  
11                   Deputy Attorney General  
12                   of the State of California  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26



---

IN THE  
United States Court of Appeals  
FOR THE NINTH CIRCUIT

ROBERT W. ROBERTS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 20858 ✓

On Appeal from the Judgment of  
The United States District Court  
For the District of Arizona

---

**BRIEF FOR APPELLEE**

---

WILLIAM P. COPPLE  
United States Attorney  
For the District of Arizona

JO ANN D. DIAMOS  
Assistant United States Attorney  
Attorneys for Appellee

FILED  
APR 30 1966  
WM. B. LUCK, CLERK





## CITATIONS

### CASES

<i>Hoffman v. U. S.</i> , (9th Cir., 1957), 244 F.2d 378 .....	6
<i>Lopez v. U. S.</i> , (9th Cir., 1951), 186 F.2d 707 .....	6
<i>May v. U. S.</i> , (9th Cir., 1958), 261 F.2d 629 .....	6
<i>Migdol v. U. S.</i> (9th Cir., 1961), 298 F.2d 513 .....	6
<i>Oughton v. U. S.</i> , (9th Cir., 1954), 215 F.2d 578 .....	6
<i>Toliver v. U. S.</i> , (9th Cir., 1957), 249 F.2d 804 .....	6
<i>Williams v. U. S.</i> , (9th Cir., 1956), 236 F.2d 894, cert. den. 352 U.S. 982, cert. den. 356 U.S. 941 .....	6

### RULES

Rule 35, Federal Rules of Criminal Procedure, Title 18 U.S.C.A. ....	5
---	---

### STATUTES

28 U.S.C.A. 1291 .....	2
28 U.S.C.A. 2255 .....	1
18 U.S.C.A. 1407 .....	4

## SUBJECT INDEX

I. Jurisdiction .....	1
II. Statement of Facts .....	2
III. Propositions of Law .....	4
IV. Summary of Argument .....	5
V. Argument .....	5
1. The Order entered by the Court on August 23, 1965, was made pursuant to the Motion to Reduce made by Appellant July 21, 1965 .....	5
2. The Order entered on November 4, 1965, was to correct an illegal sentence .....	6
3. The Appellant cannot attack the sentence imposed by the Court in Cause No. C-19339-Tucson since he is not in custody under it. ....	6
VI. Conclusion .....	7



**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

ROBERT W. ROBERTS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 20858

On Appeal from the Judgment of  
The United States District Court  
For the District of Arizona

**BRIEF FOR APPELLEE**

**I.  
JURISDICTIONAL STATEMENT OF FACT**

On January 13, 1966, Appellee, United States of America, was served with a copy of Appellant Robert W. Roberts' Motion pursuant to 28 U.S.C.A., §2255, attacking a sentence imposed by the U. S. District Court for the District of Arizona. On January 28, 1966, the Appellee, United States of America, filed its response to the said motion and sent a copy of said response by mail to the Appellant.

On February 1, 1966, the U. S. District Court for the District of Arizona, the Honorable James A. Walsh presiding, entered an Order that the petitioner (Appellant Robert W. Roberts) take nothing by his petition and that the same be dismissed. On February 14, 1966, the Notice of Appeal was lodged and on February 16, 1966, the said Court entered an order directing the Clerk to file the handwritten Notice of Appeal without prepayment of costs or fee. This is an appeal under 28 U.S.C.A., §1291.

## **II.**

### **STATEMENT OF FACTS**

On May 25, 1964, in United States of America, Plaintiff, v. Robert Walter Roberts, Defendant, Cause No. C-18959-Tucson, in the U. S. District Court for the District of Arizona, the Honorable James A. Walsh presiding, the Court entered an Order revoking the probation of Robert Walter Roberts, the Appellant herein, and committed him to the custody of the United States Attorney General for two years. (Item 1 of the Transcript of the Record on Appeal.) On February 10, 1965, Robert Walter Roberts was paroled (lines 6 and 7, page 2, of Item 5a of the Transcript of the Record on Appeal).

On June 14, 1965, in United States of America, Plaintiff, v. Robert Walter Roberts, Defendant, Cause Number C-19339-Tucson, in said U. S. District Court for the District of Arizona, the Honorable James A. Walsh presiding, the Court entered an Order and Judgment of Conviction and committed Robert Walter Roberts (the Appellant herein) to the custody of the United States Attorney General for eighteen months (Item 3 of the Transcript of the Record on Appeal). After imposing sentence the Court, in response to a question from Robert Walter Roberts (the Appellant herein) stated:

The Court: "No, I had finished, and I was going to say this to you, and I may tell you what you were going to ask about. I understand the parole violation warrant is conditioned on its being returned unserved if you are sentenced on the failure to register count. I am sentencing you on the basis that you will not be returned for parole violation, may be required to serve the remainder of your sentence. If it should turn out that I am misinformed in that, I can correct it, but the sentence is being imposed with the understanding that you will not be required to serve the remaining time on your former sentence by reason of the parole violation." (Line 18, page 4, through line 4 of page 5 of Item 5a of the Transcript of the Record on Appeal.)

Thereafter, when the Appellant herein notified the Court that the parole in the first case, Cause No. C-18959-Tucson, had been revoked, the Court, in C-19339-Tucson, entered an order as follows:

"Treating the defendant's letter dated July 20, 1965 and received on July 21, 1965, as a motion for reduction of sentence, it is ordered that the judgment entered in this cause on July 14, 1965, is amended and modified to provide that the defendant be committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a period of six months, the sentence to begin to run on June 14, 1965." (Item 4 of the Transcript of the Record on Appeal.)

Thereafter, on November 4, 1965, the Court in said Cause Number C-19339-Tucson, entered an Order as follows:

"The Court having on August 23, 1965, attempted to modify and reduce the sentence imposed in this Court on

June 14, 1965, to provide that the defendant be committed for imprisonment for a period of six months, and such order of August 23, 1965, being illegal in view of the one-year minimum sentence provided for by Section 1407, Title 18, United States Code,

"IT IS ORDERED that the order of August 23, 1965, is vacated; and

"IT IS ORDERED, FURTHER, that the imposition of sentence in this case is suspended for a period of two years from this date and the defendant is placed on probation upon condition that he conduct himself in all respects as a law-abiding citizen during the period of probation, that he make the reports and carry out the directions given to him by the probation officer who has supervision in his case, and that he do not leave the District of Arizona without permission of the probation officer." (Item 4 of the Transcript of the Record on Appeal.)

On January 16, 1966, the Appellant filed the action herein, Cause Number Civil-2130-Tucson (Item 5 of the Transcript of the Record on Appeal). On January 28, 1966, the Appellee filed its Response (Item 6 of the Transcript of the Record on Appeal). On February 1, 1966, the Court entered its Order dismissing the petition of Appellant (Item 13 of the Transcript of the Record on Appeal), and the Appeal followed, as stated in the Jurisdictional Statement of Facts.

### III.

## PROPOSITIONS OF LAW

1. A Motion to Reduce a Sentence may be made within sixty days of the original sentence.

2. An Illegal Sentence may be corrected at any time.

3. A Motion to Vacate and Set Aside Sentence imposed in criminal proceeding is available only to attack a sentence under which Appellant is in custody.

#### **IV.**

### **SUMMARY OF ARGUMENT**

1. The Order entered by the Court on August 23, 1965, was made pursuant to the Motion to Reduce made by Appellant July 21, 1965.

2. The Order entered on November 4, 1965, was to correct an illegal sentence.

3. The Appellant cannot attack the sentence imposed by the Court in Cause No. C-19339-Tucson since he is not in custody under it.

#### **V.**

### **ARGUMENT**

1. The Order entered by the Court on August 23, 1965, was made pursuant to the Motion to Reduce made by the Appellant on July 21, 1965.

Rule 35 of the Federal Rules of Criminal Procedure, Title 18 U.S.C.A., provides that the Court may reduce a sentence within sixty days after it is imposed.

As the Court stated in its Order of August 23, 1965, the Court treated Appellant's letter received by the Clerk on July 21, 1965, as a Motion to Reduce Sentence. This Motion of



Appellant was well within the sixty day period of Rule 35. (Unfortunately U. S. District Judge James A. Walsh was on assignment to the Phoenix Division of the District of Arizona in July, and to the Southern District of California for the first two weeks in August.)

2. The Order entered on November 4, 1965, was to correct an illegal sentence.

Appellant was convicted of a violation of 18 U.S.C.A., §1407, in Cause No. C-19339-Tucson, the penalty for which is one to three years. A sentence for six months under this Section is illegal. Therefore the sentence imposed on August 23, 1965, by the Court for six months is illegal and, pursuant to the provisions of Rule 35, may be corrected at any time.

3. The Appellant cannot attack the sentence imposed by the Court in Cause Number C-19339-Tucson since he is not in custody under it.

Appellant is in custody under the sentence imposed in Cause Number C-18959-Tucson as a parole violator. He is not in custody under any sentence imposed under C-19339-Tucson. Therefore, not being in custody under the sentence under attack, a motion for relief under this Section is not available to Appellant. *Lopez v. United States*, (9th Cir., 1951, 186 F.2d 707; *Oughton v. United States*, (9th Cir., 1954), 215 F.2d 578; *Hoffman v. United States*, (9th Cir., 1957), 244 F.2d 378; *Toliver v. United States*, (9th Cir., 1957), 249 F.2d 804; *May v. United States*, (9th Cir., 1958), 261 F.2d 629; *Migdol v. United States*, (9th Cir., 1961), 298 F.2d 513; *Williams v. United States*, (9th Cir., 1956), 236 F.2d 894, cert. den. 352 U.S. 982, cert. den. 356 U.S. 941.

If the Court, on November 4, 1965, had sentenced Appellant to two years and then had suspended imposition of sentence for two years, there might be some merit to Appellant's

argument that he should have been present on November 4, 1965. However, the imposition of sentence was suspended for two years, which constitutes a reduction of sentence for which he does not have to be present. Nevertheless, Appellant is not in custody under the sentence.

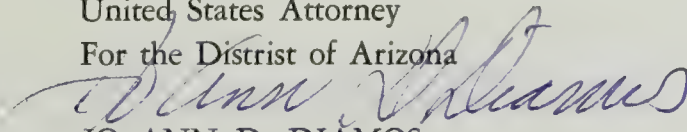
(From the records of the La Tuna Federal Correctional Institution it appears the warrant for violation of parole, dated May 10, 1965, in Cause Number C-18959-Tucson, was executed November 4, 1965; the hearing was held November 15, 1965, and parole was revoked November 29, 1965. Appellant's expected release date is October 6, 1966.)

## VI. CONCLUSION

The Appellant, having asked the Court in July, 1965 to reduce the sentence of eighteen months imposed in Cause Number C-19339-Tucson, and the Court having done so, in August, 1965, but the Court having only imposed a sentence of six months, which was corrected in November, 1965, by suspending imposition of sentence for two years, the Appellant has no grounds to attack the sentence since he is not in custody under it, and the Order of the Trial Court herein on February 1, 1966, should be affirmed.

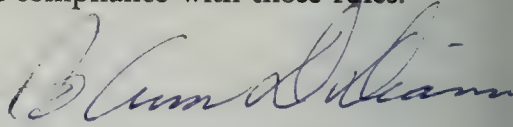
Respectfully submitted,

WILLIAM P. COPPLE  
United States Attorney  
For the District of Arizona

  
JO ANN D. DIAMOS  
Assistant United States Attorney  
Attorneys for Appellee



I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.



JO ANN D. DIAMOS

Assistant United States Attorney  
Attorney for Appellee

Three copies of the within Brief of Appellee mailed this  
.....29..... day of April, 1966, to:

ROBERT WALTER ROBERTS  
Federal Correctional Institution  
La Tuna, Texas

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

EARNEST E. STORKES,

Petitioner and Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,  
and LAWRENCE E. WILSON, Warden,  
California State Prison,  
San Quentin, California,

Respondents and Appellees.

MAY 4 1966

WM. B. LUCK, CLERK

No. 20860 ✓

APPELLEES' BRIEF

THOMAS C. LYNCH,  
Attorney General of California

ROBERT R. GRANUCCI  
Deputy Attorney General

JACKSON L. SMITH  
Deputy Attorney General

6000 State Building  
San Francisco 94102  
557-1348 (Tel.)

Attorneys for Respondents and  
Appellees



## TOPICAL INDEX

	<u>Page</u>
JURISDICTION	1
STATEMENT OF THE CASE	1
A. Proceedings in the State Courts	1
B. Proceedings in the Federal Courts	2
ARGUMENT:	
THE ESCOBEDO RULE SHOULD NOT BE APPLIED RETROACTIVELY TO APPELLANT'S CONVICTION WHICH BECAME FINAL PRIOR TO THE DATE OF THAT DECISION	2
CONCLUSION	4
CERTIFICATE OF COUNSEL	4

## TABLE OF CASES

Carrizosa v. Wilson, 244 F. Supp. 120 (N.D.Cal. 1965)	2, 3
Escobedo v. Illinois, 378 U.S. 478 (1964)	2, 3



UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

EARNEST E. STORKES,

Petitioner and Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,  
and LAWRENCE E. WILSON, Warden,  
California State Prison,  
San Quentin, California,

Respondents and Appellees.

No. 20860

APPELLEES' BRIEF

JURISDICTION

The jurisdiction of the United States District Court, Northern District of California, Southern Division, to entertain appellant's application for a writ of habeas corpus was conferred by Title 28, United States Code § 2241. The jurisdiction of this Court is conferred by Title 28, U.S.C. § 2253.

STATEMENT OF THE CASE

A. Proceedings in the State Courts.

Appellant Earnest E. Storkes was convicted of violation of section 245 of the California Penal Code on April 24, 1961 (CT 15). <sup>1/</sup> Appellant did not appeal his conviction (CT 2).

---

1. The initials "CT" as used herein refer to the transcript of record filed in this Court, constituting the United States District Court Clerk's record on appeal.





Appellant's petition for a writ of habeas corpus filed in the California State Supreme Court was denied on February 11, 1965 (CT 6).

B. Proceedings in the Federal Courts

On July 30, 1965, appellant filed an application for writ of habeas corpus in the United States District Court, Northern District of California, Southern Division (CT 1). On July 30, 1965, the District Court issued an order denying the petition for writ of habeas corpus on the grounds that Carrizosa v. Wilson, 244 F.Supp. 120 (N.D.Cal. 1965) held that Escobedo v. Illinois, 378 U.S. 478 (1964) does not apply retroactively to affect convictions final before June 22, 1964, and that it was clear that appellant's conviction must have become final not later than some time in 1961 (CT 15, 16).

Appellant applied for a certificate of probable cause on December 1, 1965 (CT 17, 18). An order granting the certificate of probable cause and leave to proceed in forma pauperis was issued on March 1, 1966 (CT 24).

ARGUMENT

THE ESCOBEDO RULE SHOULD NOT BE  
APPLIED RETROACTIVELY TO APPEL-  
LANT'S CONVICTION WHICH BECAME  
FINAL PRIOR TO THE DATE OF THAT  
DECISION

Appellant seeks to upset his conviction by urging that the exclusionary rule in Escobedo v. Illinois,



supra, should not be applied retroactively. Judgment of conviction was entered against appellant on April 24, 1961 (CT 15). Appellant did not appeal his conviction (CT 2). Escobedo was decided on June 22, 1964. Thus, appellant's conviction was final long before the decision was rendered in Escobedo.

The United States District Court, Northern District of California, Southern Division, has ruled in Carrizosa v. Wilson, supra, 244 F.Supp. 120 (N.D.Cal. (1965) that Escobedo may not be applied retroactively. The District Court below rejected appellant's contention, based upon Escobedo, solely upon the authority of Carrizosa v. Wilson, supra. The Carrizosa case is before this Court (No. 20304), and the issue of retroactivity of Escobedo has been extensively briefed therein by the California Attorney General's Office. Additional copies of the Carrizosa brief have been filed with this Court for its use in the instant appeal, and a copy has been served on appellant Storckes. The argument as presented in the Carrizosa brief is hereby incorporated by reference into this brief, and we submit, completely disposes of appellant's contention in this regard. The District Court therefore properly rejected those contentions.



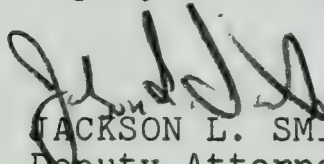
CONCLUSION

For the reasons stated, it is respectfully submitted that the order of the District Court denying appellant's petition for a writ of habeas corpus should be affirmed.

Dated: April 29, 1966.

THOMAS C. LYNCH,  
Attorney General of California

ROBERT R. GRANUCCI  
Deputy Attorney General

  
JACKSON L. SMITH  
Deputy Attorney General

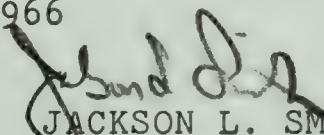
Attorneys for  
Respondents and Appellees

rcg  
SF-CR  
65-655

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

Dated: April 29, 1966

  
JACKSON L. SMITH  
Deputy Attorney General





UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JACKIE LEE SESSIONS,  
Petitioner and Appellant,

vs.

No. 20861 ✓

LAWRENCE E. WILSON, Warden,  
California State Prison,  
San Quentin, California,  
Respondent and Appellee.

APPELLEE'S BRIEF

THOMAS C. LYNCH, Attorney General  
of the State of California

ROBERT R. GRANUCCI  
Deputy Attorney General

JACKSON L. SMITH  
Deputy Attorney General

6000 State Building  
San Francisco, California 94102  
Telephone: 557-1348

Attorneys for Respondent-Appellee.

FILED

NOTED

W. D. LUCK, CLERK





## TOPICAL INDEX

	<u>Page</u>
JURISDICTION	1
STATEMENT OF THE CASE	1
A. Proceedings in the State Courts.	1
B. Proceedings in the Federal Courts.	2
SUMMARY OF APPELLEE'S ARGUMENT	2
ARGUMENT	
I. THE <u>ESCOBEDO</u> RULE SHOULD NOT BE APPLIED RETROACTIVELY TO APPELLANT'S CONVICTION WHICH BECAME FINAL PRIOR TO THE DATE OF THAT DECISION.	3
II. APPELLANT'S PLEA OF GUILTY FORE- CLOSES COLLATERAL ATTACK UPON HIS CONVICTION UPON THE GROUNDS THAT IT RESULTED FROM ILLEGALLY OBTAINED EVIDENCE.	5
III. APPELLANT WAS REPRESENTED BY COUNSEL IN ALL CRITICAL STAGES OF THE PRO- CEEDINGS.	6
CONCLUSION	7



## TABLE OF CASES

	<u>Page</u>
<u>Carrizosa v. Wilson,</u> 244 F.Supp. 120 (N.D.Cal. 1965)	3, 4
<u>Davis v. United States,</u> 347 F.2d 374 (9th Cir. 1965)	4, 6
<u>Escobedo v. Illinois,</u> 378 U.S. 478 (1964)	3, 4
<u>Harris v. United States,</u> 338 F.2d 75 (9th Cir. 1964)	4, 5, 6
<u>In re Seiterle,</u> 61 Cal.2d 651 (1964)	4
<u>Morse v. United States,</u> 295 F.2d 38 (8th Cir. 1961)	6
<u>Sullivan v. United States,</u> 315 F.2d 304 (10th Cir. 1963), <u>cert. denied,</u> 375 U.S. 910	6
<u>Townsend v. Burke,</u> 334 U.S. 736 (1948)	4, 6
<u>United States v. Kniess,</u> 264 F.2d 253 (7th Cir. 1959), <u>cert. denied,</u> 359 U.S. 947	6
<u>United States v. Miller,</u> 293 F.2d 697 (2d Cir. 1961)	6
<u>Waley v. Johnston,</u> 139 F.2d 117 (9th Cir. 1944), <u>cert. denied,</u> 321 U.S. 779	6
<u>Watts v. United States,</u> 278 F.2d 247 (D.C. Cir. 1960)	6
<u>Wilson v. Harris,</u> 351 F.2d 840 (9th Cir. 1965)	6



UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JACKIE LEE SESSIONS,	)	
	)	
Petitioner and Appellant,	)	
	)	
vs.	)	No. 20861
	)	
LAWRENCE E. WILSON, Warden,	)	
California State Prison,	)	
San Quentin, California,	)	
	)	
Respondent and Appellee.	)	
	)	
	)	

---

APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court, Northern District of California, Southern Division, to entertain appellant's application for a writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253.

STATEMENT OF THE CASE

A. Proceedings in the State Courts.

On January 31, 1957, appellant Jackie Lee Sessions pled guilty to a charge of violating California Penal Code section 211 (robbery). (See EXHIBIT "A")





attached hereto and incorporated herein as though fully set out.) Appellant did not appeal his conviction (CT 30).<sup>1/</sup>

Appellant was represented by counsel throughout all critical stages of the judicial process (Exhibit A). Appellant's petition for a writ of habeas corpus, filed in the California Supreme Court, was denied on September 2, 1965 (CT 5-6).

B. Proceedings in the Federal Courts.

On January 13, 1966, appellant filed an application for a writ of habeas corpus in the United States District Court for the Northern District of California, Southern Division (CT 1). On January 13, 1966, the District Court issued an order denying the petition (CT 30). Appellant applied for a certificate of probable cause on February 3, 1966 (CT 34). An order granting the certificate of probable cause and granting appellant's motion to proceed in forma pauperis was issued on March 1, 1966 (CT 5).

SUMMARY OF APPELLEE'S ARGUMENT

I. The Escobedo rule should not be applied retroactively to appellant's conviction which became final prior to the date of that decision.

---

1. The initials "CT" as used herein refer to the transcript of record filed in this Court, constituting the United States District Court Clerk's record on appeal.



II. Appellant's plea of guilty forecloses collateral attack upon his conviction upon the grounds that it resulted from illegally obtained evidence.

III. Appellant was represented by counsel in all critical stages of the proceedings.

### ARGUMENT

#### I

THE ESCOBEDO RULE SHOULD NOT BE APPLIED RETROACTIVELY TO APPELLANT'S CONVICTION WHICH BECAME FINAL PRIOR TO THE DATE OF THAT DECISION.

Appellant seeks to upset his conviction by urging that the exclusionary rule of Escobedo v. Illinois, 378 U.S. 478 (1964), should be applied retroactively.

Judgment of conviction was entered against appellant on January 31, 1957 (Exhibit A). He did not appeal. Escobedo was decided on June 22, 1964. Thus, appellant's conviction necessarily became final long before the decision was rendered in Escobedo. The United States District Court, Northern District of California, Southern Division, has ruled in Carrizosa v. Wilson, 244 F.Supp. 120 (N.D.Cal. 1965), that Escobedo is not to be applied retroactively. The District Court below rejected appellant's contention based upon Escobedo solely upon the authority of Carrizosa. The Carrizosa



brief is before this Court (No. 20304), and the issue of retroactivity of Escobedo has been extensively briefed therein by the California Attorney General's Office. Additional copies of the Carrizosa brief have been filed with this Court for its use in the instant appeal and a copy has been served upon appellant. The argument as presented in the Carrizosa brief is hereby incorporated by reference into this brief, and we submit, completely disposes of appellant's contention in this regard. The District Court therefore properly rejected those contentions.

Moreover, appellant's voluntary plea of guilty forecloses any consideration of his claim. Appellant's extrajudicial statements were not used to convict him; his conviction was based upon his plea of guilty.

Townsend v. Burke, 334 U.S. 736 (1948); Davis v. United States, 347 F.2d 374 (9th Cir. 1965); Harris v. United States, 338 F.2d 75 (9th Cir. 1964); In re Seiterle, 61 Cal.2d 651 (1964). In the Harris case, this Court said:

"By his plea of guilty appellant foreclosed his right to raise objections to the manner in which evidence upon which he was indicted was obtained. This evidence, because of his guilty plea, was not used against him. Had he stood trial his objection to its





introduction, if made and overruled by the trial court, could have been raised on appeal. Under the circumstances he may not belatedly raise the contention under 28 U.S.C. § 2255. *Eberhart v. United States*, 9 Cir., 1958, 262 F.2d 421 \* \* \* The conviction and sentence which follow a plea of guilty are based solely and entirely upon said plea and not upon any evidence which may have been improperly acquired by the prosecuting authorities. *United States v. French*, 7 Cir., 1960, 274 F.2d 297; *United States v. Sturm*, 7 Cir., 1950, 180 F.2d 413; *Kinney v. United States*, 10 Cir., 1949, 177 F.2d 895." Harris v. United States, supra at 80.

## II

APPELLANT'S PLEA OF GUILTY FORECLOSES COLLATERAL ATTACK UPON HIS CONVICTION UPON THE GROUNDS THAT IT RESULTED FROM ILLEGALLY OBTAINED EVIDENCE.

Appellant next contends that he was subjected to an unreasonable search and seizure and that illegally obtained evidence was used against him. Again, appellant's voluntary plea of guilty forecloses any consideration of his claim. Even assuming the evidence was illegally seized, such evidence was not used to convict him; his





conviction was based on his plea of guilty. Townsend v. Burke, supra; Davis v. United States, supra; Harris v. United States, supra; In re Seiterle, supra.

Even if appellant's decision to plead guilty was influenced by the allegedly illegally obtained evidence, the federal courts have consistently held that such a claim that inadmissible evidence induced a plea of guilty is no basis for setting aside a conviction. Sullivan v. United States, 315 F.2d 304 (10th Cir. 1963), cert. denied, 375 U.S. 910; Morse v. United States, 295 F.2d 38 (8th Cir. 1961); United States v. Miller, 293 F.2d 697 (2d Cir. 1961); Watts v. United States, 278 F.2d 247 (D.C. Cir. 1960); United States v. Knies, 264 F.2d 253 (7th Cir. 1959), cert. denied, 359 U.S. 947; Waley v. Johnston, 139 F.2d 117 (9th Cir. 1944), cert. denied, 321 U.S. 779.

### III

APPELLANT WAS REPRESENTED BY COUNSEL  
IN ALL CRITICAL STAGES OF THE  
PROCEEDINGS.

Appellant next contends that his conviction should be reversed because he was not represented by counsel in all stages of the proceedings.

Appellant alleges that he was not represented by counsel at the preliminary examination (CT 31). However, as pointed out by this Court in Wilson v.



Harris, 351 F.2d 840 (9th Cir. 1965), the preliminary examination is not a critical stage in the proceedings so as to constitutionally require appointment of counsel. The record does show that appellant was represented by counsel both at trial and at the time of sentencing. (Exhibit A.)

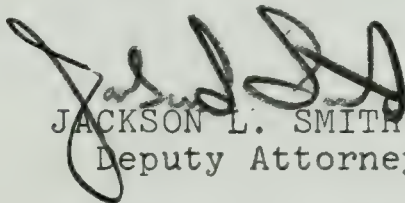
CONCLUSION

For the reasons stated it is respectfully submitted that the order of the District Court denying appellant's petition for a writ of habeas corpus should be affirmed.

DATED: MAY 10, 1966

THOMAS C. LYNCH, Attorney General  
of the State of California

ROBERT R. GRANUCCI  
Deputy Attorney General

A handwritten signature in dark ink, appearing to read 'Jackson L. Smith', is written over the typed name and title of the Deputy Attorney General.

JACKSON L. SMITH  
Deputy Attorney General

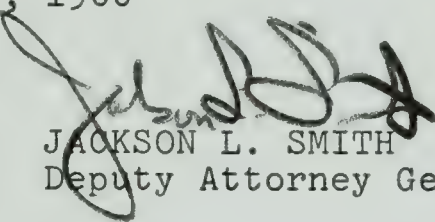
Attorneys for Respondent-Appellee.



CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

DATED: MAY 10, 1966



JACKSON L. SMITH  
Deputy Attorney General





E X H I B I T "A"



C. I. M.

1957 FEB 14 PM 12:51

G.C. ADMITTANCE



DEPT. No. 3 CASE NO. 7900

VERA K. GIBSON, CLERK  
KERN COUNTY, CALIF.  
BY *[Signature]*

FEB 1 10 34 AM '57

BOOK  
PAGE  
FILED

In the Superior Court of the State of California

IN AND FOR THE COUNTY OF KERN

ABSTRACT OF JUDGMENT

(Commitment to State Prison as provided by Penal Code Section 1213.5)

The People of the State of California,

Hon. W. L. Bradshaw  
(Judge of Superior Court)

vs

Entered ☒  
Feb ☐

Kit Nelson

(District Attorney)

Defendant:

Jack B. Hislop

(Counsel for Defendant)

Jackie Lee Sessions

This certifies that on the 11th day of January, 19 57 judgment of conviction of the above-named defendant was entered as follows:

In Case No. 7900 Count No. One he was convicted by Court on his plea of

Guilty as Charged (guilty, not guilty, former conviction or acquittal, once in jeopardy,

not guilty by reason of insanity); of the crime of Felony, to wit: Robbery in the 1st degree

(designation of crime and degree, if any, including fact that it constitutes a second or subsequent conviction of same offense if that affects the sentence and if under Section 209 of the Penal Code whether victim suffered bodily harm)

in violation of Section 211 of the Penal Code

(reference to Code or Statute, including Section and Sub-section);

with prior convictions charged and proved or admitted as follows: None

DATE	COUNTY AND STATE	CRIME	DISPOSITION

Defendant was charged and admitted being, or was found to have been armed with a deadly weapon at the time (was) or (was not) of commission of the offense, or a concealed deadly weapon at the time of his arrest within the meaning of Penal Code Sections 969c and 3024.



Defendant **was not** adjudged a habitual criminal within the meaning of Sub-division **a or b** of  
(was) or (was not) (a) or (b)  
Section 644 of the Penal Code; ~~and he is not~~  
(is) or (is not)

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the said defendant be punished by imprisonment in the State Prison of the State of California, for the term provided by law, and that he be remanded to the Sheriff of the **Kern** County of **Kern** and by him delivered to the Director of Corrections of the State of California at the place hereinafter designated.

It is ordered that sentences shall be served in respect to one another as follows:  
(Note whether concurrent or consecutive as to each count):

and in respect to any prior incompleated sentence (s) as follows: **concurrently if any**  
(NOTE whether concurrent or consecutive as to all incomplete sentences from other jurisdictions).

To the Sheriff of the **Kern** County of **Kern** and to the Director of Corrections:

Pursuant to the aforesaid judgment, this is to command you, the said Sheriff, to deliver the above-named defendant into the custody of the Director of Corrections at **The California Institution for Men at Chino, California** at your earliest convenience.

Witness my hand and seal of said court

this **31st** day of **January, 1957**

**VERA K. GIBSON** Clerk

by *[Signature]* Deputy

SEAL

State of California,  
County of **Kern** ss.

I do hereby certify that the foregoing to be a true and correct abstract of the Judgment duly made and entered on the minutes of the Superior Court in the above entitled action as provided by Penal Code Section 1213

Attest my hand and seal of the said Superior Court this **31st** day of **January, 1957**

**VERA K. GIBSON** By *[Signature]* Deputy Clerk  
County Clerk and Ex-officio Clerk of the Superior Court of the State of California in and for the  
County of **Kern**

The Honorable *[Signature]*  
Judge of the Superior Court of the State of California, in and for the  
County of **Kern**

NOTE: If probation was granted in any sentence of which abstract of judgment is certified, attach a minute order reciting the fact and imposing sentence or ordering a suspended sentence into effect.

*[Handwritten notes:]*  
P. C. Johnston  
Deputy Sheriff  
Kern Co.  
2-14-57



No. 20,863

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

COMMISSIONER OF INTERNAL REVENUE,

*Petitioner,*

VS.

OSCAR E. BAAN and EVELYN K. BAAN,

*Respondents.*

**PETITION FOR REHEARING**

HARRY R. HORROW,

STEPHEN J. MARTIN,

Standard Oil Building,

225 Bush Street,

San Francisco, California 94104,

*Attorneys for Respondents.*

AUG 1967

FILED

AUG 1 1967

WM. B. LUCK, CLERK





No. 20,863

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

---

COMMISSIONER OF INTERNAL REVENUE,

*Petitioner,*

vs.

OSCAR E. BAAN and EVELYN K. BAAN,

*Respondents.*

**PETITION FOR REHEARING**

---

*To the Honorable Frederick G. Hamley, Charles M. Merrill, and Walter Ely, Judges of the United States Court of Appeals for the Ninth Circuit:*

It is respectfully requested that a rehearing be granted respondents in this case upon the following grounds:

1. The Court erred in holding that the subject of the relevant distribution by Pacific was the stock rights issued by Pacific to its shareholders instead of the shares issued by Northwest. Repeated references in its opinion (pp. 10-12) to a "distribution of stock rights" show that the Court did not follow the Supreme Court's decision in *Palmer v. Commissioner* (1937) 302 U.S. 63. In *Palmer* the Court stated that even though stock rights *have* a market or exchange value when issued, they are at most options or continuing offers, and no distribution of corpo-

rate assets results from their issue; “they are not dividends within the statutory definition” (302 U.S. 71). It is the transfer of corporate property *following* exercise of the rights, and not their receipt or exercise, that constitutes the distribution of corporate assets under the relevant tax laws. It is no answer to the holding of *Palmer* to say that it involved a question of intention to pay a dividend, and on the facts no “spread” evidencing such an intention was present (Op., p. 12). The Commissioner’s contention in *Palmer*—previously accepted by several courts of appeals—was precisely that stock rights were themselves property, the issuance of which constituted a dividend. The paragraph from *Palmer* quoted on page 20 of the taxpayers’ brief, and paraphrased above, set forth the true nature of stock rights, overruled the contrary decisions, and definitively rejected the Commissioner’s contention. None of the cases there cited by the Supreme Court related to questions of intention, but only to the *nature* of stock rights.

2. The Court erred in holding that the distribution of Northwest stock to taxpayers was not a distribution solely of stock or securities with respect to their Pacific stock as required by section 355(a)(1)(A), but was a distribution with respect to the taxpayers’ Pacific stock *plus* the payment of \$16 a share (Op., p. 11). In this connection the Court recognized that if the taxpayers’ contribution to Pacific had taken the form of a contribution of Pacific stock, Pacific’s distribution of the Northwest stock would have been “with respect to” Pacific’s stock. “But,” the Court said, “where the plan requires a cash payment by a recipient shareholder, a new element, unassociated with the shareholder’s ownership of the dis-

contributing corporation's stock, has been interjected" (Op., p. 13). This ignores the Tax Court's finding that the cash payments by the Pacific shareholders were contributions to the *capital* of Pacific made as a condition to receiving the Northwest stock (45 T.C. 78, 86-87, 90). The shareholders' proportionate interests in Pacific would be identical regardless of whether their contribution was in cash or in Pacific's stock. There was no element "unassociated with the shareholder's ownership of [Pacific's] stock."

3. The Court erred in holding that the retention of control of Northwest by the Pacific shareholders was not reasonably certain at the time of distribution (Op., p. 15, p. 17). The Northwest shares were offered to the Pacific shareholders on the representation in the proxy statement that American would exercise all of its rights (Exh. No. 20-DD, p. 4). Since American owned more than 80 per cent of Pacific, it was a foregone conclusion at the outset that it would "control" Northwest.

4. The Court erred in holding, as a matter of fact, that the two transfers of Northwest stock by Pacific did not meet the requirements of section 355(a)(1)(D) in that they did not constitute a "single transaction" (Op., p. 20). The Court reached this issue upon consideration, as "a question of law relative to facts which are not in dispute" (Op., p. 16), of the Commissioner's argument made for the first time on appeal that section 355 requires a single distribution as of one date. Though it rejected the Commissioner's legal contention, the Court went on to discuss portions of the record and to make a factual determination that the two distributions extended over a greater period of time than "reasonably necessary considering the practical problems involved" (Op., p. 20).

This determination ignored the Tax Court's contrary finding of fact on the point (45 T.C. 87, n. 3)—a finding amply supported by the record and certainly not clearly erroneous. Far from attacking the Tax Court's finding, the Commissioner in fact conceded that the two distributions were part of a single plan (Br., pp. 25-26). This Court should accept that finding (Fed. Rules Civ.Proc., sec. 52(a)).

5. This Court is in error in attributing to Congress an intent to treat as taxable the receipt of the Northwest shares by the Pacific shareholders on the payment of cash into Pacific, when the Northwest stock could have been received by them tax free without such payment. Nowhere does the Court's opinion point to any statutory language or legislative history supporting this view. A distribution of the Northwest shares to Pacific shareholders without any cash payment would have been tax free under section 355. Likewise, if the Pacific shareholders had simply paid a cash contribution to Pacific's capital, there would have been no tax. It could not have been the intent of Congress that these two components, neither of which would be taxable if done separately, give rise to a tax when done together. Clearly, the Pacific shareholders owned nothing more after the distribution of the Northwest stock than what they owned before the plan of reorganization was adopted.

6. On July 26, 1967, the Court of Appeals for the Second Circuit decided the case of *Commissioner v. Gordon*, which involved the same facts and legal issues as presented in the case at bar.<sup>1</sup> That court held that section

---

<sup>1</sup>This case and *Gordon* are two test cases which affect about 26,000 individual shareholders of Pacific.



355 applied and, therefore, the exercise of the rights by Pacific's stockholders did not constitute a taxable transaction. We submit that the reasoning of the *Gordon* decision is most persuasive and that this Court should reconsider its decision in that light.<sup>2</sup>

We respectfully request that a rehearing be granted or that this case be heard en banc so that further consideration can be given to the important issues presented. In any event, since further proceedings will be necessary in this case, the Court's opinion should be modified to delete the finding, contrary to the Tax Court's determination, that the two distributions of Northwest stock were not parts of a single transaction.

Respectfully submitted,

HARRY R. HORROW,

STEPHEN J. MARTIN,

*Attorneys for Respondents.*

---

<sup>2</sup>For the convenience of the Court, we attach as an appendix to this Petition a copy of the Second Circuit's opinion in the *Gordon* case.

**CERTIFICATE**

I certify that I am one of the attorneys responsible for the preparation of this Petition for Rehearing; that in my judgment it is well founded; and that it is not interposed for delay.

**STEPHEN J. MARTIN**

**(Appendix Follows)**



## **Appendix**



UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

---

No. 214—September Term, 1966.

Argued January 24, 1967                      Decided July 26, 1967.)

Docket No. 30572

---

COMMISSIONER OF INTERNAL REVENUE,

*Petitioner,*

—v.—

IRVING GORDON and MARGARET GORDON,

*Respondents.*

---

IRVING GORDON and MARGARET GORDON,

*Petitioners,*

—v.—

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

---

Before :

MOORE and FRIENDLY, *Circuit Judges;*

BRYAN,\* *District Judge.*

---

---

\* For the Southern District of New York, sitting by designation.

Petition for review of a decision of the Tax Court of the United States, Raum, *Judge*. The Commissioner of Internal Revenue petitions this Court to review a decision of the Tax Court that a distribution of stock to the taxpayers was governed by Section 355 of the Internal Revenue Code of 1954. Taxpayer seeks review of a decision that the sale of stock rights constituted dividend income. Opinion below reported at 45 T. C. 71. Affirmed in part and reversed in part.

---

MARTIN T. GOLDBLUM, Washington, D. C.  
(Mitchell Rogovin, Assistant Attorney General; Lee A. Jackson, Gilbert E. Andrews, on the brief), *for petitioner-respondent*.

HARRY R. HORROW, San Francisco, California  
(Stephen J. Martin, Pillsbury, Madison & Sutro, San Francisco, California, on the brief), *for respondents-petitioners*.

---

MOORE, *Circuit Judge*:

The taxpayers, Irving and Margaret Gordon (husband and wife) in 1961 owned 1,540 shares of Pacific Telephone and Telegraph Company (Pacific) common stock. Their stock certificate represented a fractional part, in theory at least, of all the assets of this company. Although collectively the stockholders owned these assets, the corporate form was not within the control of the individual stockholder but, for all practical purposes, in the control of the company's management. Therefore, when Pacific decided to have its assets held by two corporations instead of one, the position of the Gordons remained unchanged. They merely needed to have another piece of paper to evidence

their same fractional asset ownership. This, in substance, Pacific supplied. However, as a result of the transaction, the Commissioner of Internal Revenue (the Commissioner) has assessed an income tax against the Gordons who properly ask, probably in some wonderment, how this corporate change of asset ownership brought income to them and, if so, where is it?

Before considering the facts, which are not in dispute, the trite statement that an income tax should be a tax on income may serve as a beacon. All too frequently, Commissioners and courts launch into an analysis of tax sections, subsections, paragraphs and subparagraphs which practically exhaust the alphabet and Roman and Arabic numbers. In this intellectual exercise, the taxpayer often is only an incidental (though necessary) figure. Therefore, this review will be based on the principle that the ultimate question to be answered is: did the Gordons receive taxable income within the meaning of the Code because of their ownership of a Pacific stock certificate? It must be presumed that in enacting all the sections of the Code, relating to corporate changes, Congress adhered to the fundamental purpose of taxing income. The Tax Court, 45 T. C. 71, has held that they did not as to 1,536 shares; the Commissioner appeals. As to four (4) stock rights sold, the Tax Court held that income resulted and the Gordons appeal. We affirm the Tax Court as to the Commissioner's appeal and reverse as to the Gordons' (taxpayers') appeal.

The principal question presented by this petition to review the decision of the Tax Court is whether the nonrecognition provisions of Section 355 of the Internal Revenue Code of 1954 can be applied to a spin-off by Pacific of a part of its assets. Pacific is a subsidiary of the American Telephone and Telegraph Company (AT&T) which at all times owned over 80% of Pacific's common stock. Prior to

July 1, 1961, Pacific provided the telephone services for California, Oregon, Washington and Idaho.<sup>1</sup> This is a rapidly growing area of the country and for purely business reasons, Pacific decided to divide the corporation. To this end a new corporation, Pacific Northwest Bell Telephone Company (Northwest), was formed to take over the non-California business of Pacific. Pacific's management studied a variety of methods by which to effect the division, one of which was a conventional spin-off which clearly would have qualified under Section 355.<sup>2</sup> This

---

1 Pacific also provided telephone service in Nevada through a wholly-owned subsidiary which was not included in the spin-off here considered.

2 Section 355 of the Internal Revenue Code of 1954 reads as follows:

"Sec. 355. Distribution of Stock and Securities of a Controlled Corporation.

(a) Effect on Distributees.

(1) General Rule.—If—

(A) a corporation (referred to in this section as the 'distributing corporation')—

(i) distributes to a shareholder, with respect to its stock, or

(ii) distributes to a security holder, in exchange for its securities, solely stock or securities of a corporation (referred to in this section as 'controlled corporation') which it controls immediately before the distribution,

(B) the transaction was not used principally as a device for the distribution of the earnings and profits of the distributing corporation or the controlled corporation or both (but the mere fact that subsequent to the distribution stock or securities in one or more of such corporations are sold or exchanged by all or some of the distributees (other than pursuant to an arrangement negotiated or agreed upon prior to such distribution) shall not be construed to mean that the transaction was used principally as such a device),

(C) the requirements of subsection (b) (relating to active businesses) are satisfied, and

(D) as part of the distribution, the distributing corporation distributes—

(i) all of the stock and securities in the controlled corporation held by it immediately before the distribution, or



method was rejected partly because of state law obstacles and, presumably, partly because the AT&T family filed a consolidated tax return which eliminated intercorporate dividends and thus qualification under Section 355 was not of great importance to the corporate management. It is,

---

- (ii) an amount of stock in the controlled corporation constituting control within the meaning of section 368(c), and it is established to the satisfaction of the Secretary or his delegate that the retention by the distributing corporation of stock (or stock and securities) in the controlled corporation was not in pursuance of a plan having as one of its principal purposes the avoidance of Federal income tax,

then no gain or loss shall be recognized to (and no amount shall be includible in the income of) such shareholder or security holder on the receipt of such stock or securities.

(2) Non pro rata distributions, etc.—Paragraph (1) shall be applied without regard to the following:

- (A) whether or not the distribution is pro rata with respect to all of the shareholders of the distributing corporation,
- (B) whether or not the shareholder surrenders stock in the distributing corporation, and
- (C) whether or not the distribution is in pursuance of a plan of reorganization (within the meaning of section 368(a)(1)(D)).

(3) Limitation.—Paragraph (1) shall not apply if—

- (A) the principal amount of the securities in the controlled corporation which are received exceeds the principal amount of the securities which are surrendered in connection with such distribution, or
- (B) securities in the controlled corporation are received and no securities are surrendered in connection with such distribution.

For purposes of this section (other than paragraph (1)(D) of this subsection) and so much of section 356 as relates to this section, stock of a controlled corporation acquired by the distributing corporation by reason of any transaction which occurs within 5 years of the distribution of such stock and in which gain or loss was recognized in whole or in part, shall not be treated as stock of such controlled corporation, but as other property.

(4) Cross Reference.—

For treatment of the distribution if any property is received which is not permitted to be received under this subsection (in-



however, vital to the minority Pacific stockholders and to the taxpayers Gordon, who owned 1,540 shares of Pacific common stock. It is their position that regardless of what the Pacific management intended, the distribution should be given the preferred tax treatment provided by Section 355.

---

cluding an excess principal amount of securities received over securities surrendered), see section 356.

(b) Requirements as to Active Business.—

(1) In General.—Subsection (a) shall apply only if either—

- (A) the distributing corporation, and the controlled corporation (or, if stock of more than one controlled corporation is distributed, each of such corporations), is engaged immediately after the distribution in the active conduct of a trade or business, or
  - (B) immediately before the distribution, the distributing corporation had no assets other than stock or securities in the controlled corporations and each of the controlled corporations is engaged immediately after the distribution in the active conduct of a trade or business.
- (2) Definition.—For purposes of paragraph (1), a corporation shall be treated as engaged in the active conduct of a trade or business if and only if—
- (A) it is engaged in the active conduct of a trade or business, or substantially all of its assets consist of stock and securities of a corporation controlled by it (immediately after the distribution) which is so engaged,
  - (B) such trade or business has been actively conducted throughout the 5-year period ending on the date of the distribution,
  - (C) such trade or business was not acquired within the period described in subparagraph (B) in a transaction in which gain or loss was recognized in whole or in part, and
  - (D) control of a corporation which (at the time of acquisition of control) was conducting such trade or business—
    - (i) was not acquired directly (or through one or more corporations) by another corporation within the period described in subparagraph (B), or
    - (ii) was so acquired by another corporation within such period, but such control was so acquired only by reason of transactions in which gain or loss was not recognized in whole or in part, or only by reason of such transactions combined with acquisitions before the beginning of such period.”

The plan ultimately agreed upon required Pacific to transfer to Northwest all of the non-California assets and liabilities plus \$110,000 in cash in return for the issuance of 30,460,000 shares of Northwest common stock and an interest bearing demand note in the amount of \$200,000,000. The result of these arrangements was to give Northwest a capital structure similar to that of Pacific. On June 30, 1961, Pacific ceased all non-California business. This Plan, which had been accepted by the Pacific shareholders in March of 1961, further required Pacific to offer to its shareholders the right to purchase *all* of the Northwest stock held by Pacific on a pro rata basis. It was left to the sole discretion of the Pacific management, however, to determine the number of offerings of Northwest stock to the Pacific shareholders and the price at which the stock would be made available. The Plan, nevertheless, made it clear that these decisions were to be made in response to the capital requirements of Pacific and it was anticipated that all of the Northwest stock would be distributed within three years. On September 20, 1961, Pacific issued one transferable stock right for each outstanding share of Pacific stock. Six such rights plus a payment of \$16 were required to subscribe to one share of Northwest stock, which at this time had a fair market value of \$26 per share. This initial distribution involved approximately 57% of the Northwest stock held by Pacific, an amount selected in order to pass control of Northwest to AT&T immediately following the first stage of the distribution. A second and final offering, the terms of which required eight rights plus \$16 to obtain one share of Northwest stock, was made on June 12, 1963, of the remaining 43% of the stock.

Pacific adopted this more complex mechanism for distribution to enable it to satisfy simultaneously its very large requirements for additional capital to finance expan-

sion. In each annual period prior to 1961, Pacific had been required to issue common stock or debentures in an average amount of nearly 200 million dollars per year. In the three years following 1961, however, these capital requirements were satisfied through the funds received from its distribution of Northwest stock and no common stock or debentures were issued.

In response to a request by Pacific, the Commissioner issued a ruling letter prior to the first offering which concluded that the sale of the rights would produce ordinary income and that their exercise would constitute a dividend under Section 301. He further stated that Section 355 would not be applicable.

This appeal involves only the tax year of 1961. The taxpayers exercised 1,536 of the 1,540 rights they received that year. On their income tax return, the taxpayers took the position that this aspect of the transaction was not subject to tax and therefore reported no gain or loss. The other four rights were sold for a total amount of \$6.36, which was reported as a capital gain. On July 19, 1963, the Commissioner assessed a deficiency of \$895.10 based on these transactions.

## I.

It is not disputed that the Pacific-Northwest corporate division fulfilled a valid business purpose. Nor is it disputed that the method selected by Pacific to accomplish this division was dictated by valid business reasons. In fact, it does not appear to be disputed that there was no possibility under this transaction for turning ordinary income into capital gains—the evil which Section 355 was designed to prevent. Rather, the government contends that in a number of technical respects, the requirements of that Section were not met and that, therefore, the dis-

tribution of Northwest stock must be treated as a dividend. While the government raises a number of purely technical questions to which we shall shortly turn, the truly decisive question before this Court is how Section 355 shall be construed. The taxpayers argue that Section 355 is the embodiment of a Congressional decision that corporate divisions are desirable as a matter of public policy and should not be impeded by tax considerations. Congress recognized, of course, that corporate divisions are a perfect vehicle for bail-outs of earnings and profits and, therefore, hedged in the use of Section 355 with a number of conditions which must be met. But when the division presents no opportunity for a bail-out, these conditions should not be so construed as to frustrate the basic Congressional purpose. The Commissioner, for his part, argues that Section 355 is merely a tax concession granted by Congress to permit certain narrowly defined transactions. He concludes that, as with all such privileges, the statute is to be narrowly construed.

In evaluating the jurisprudential philosophy of the government, we are not required to limit our search to the instant case in which it serves the Commissioner's purpose to argue for a narrow construction. Initially, we note the long line of cases holding that mere compliance with the reorganization sections does not ensure a tax-free exchange if there is lacking a business purpose or, perhaps, a continuity of interest in the transaction. See, e.g., *Gregory v. Helvering*, 293 U. S. 465 (1935), *Bazley v. Commissioner*, 331 U. S. 737 (1947). While, obviously, the converse of this proposition is not true, these cases properly stand for the proposition that in determining tax results, the courts do not merely look to the literal language of the statute but also view the business transaction as a whole in conjunction with the underlying purpose of the



taxing statute. We are not aware of any rule of law that preserves such a salutary tenet of construction for the exclusive benefit of the Commissioner. See *Helvering v. Alabama Asphaltic Limestone Co.*, 315 U. S. 179 (1942).<sup>3</sup>

Furthermore, we note that the Commissioner has not always taken such a constricted view of the reorganization sections. When it serves his purpose, the Commissioner has argued that when a reorganization has in fact occurred, it should be taxed under the reorganization sections of the Code even though the strict requirements of the statute have not been met. See, e.g., *Gallagher v. Commissioner*, 39 T. C. 144 (1962); *Berghash v. Commissioner*, 43 T. C. 743 (1965), *aff'd* 361 F. 2d 257 (2 Cir. 1966).

While we think it beyond dispute that the courts are permitted a certain flexibility in applying the Code, it should be added that cases in which the courts must stray from the literal language of the Code in order to achieve its underlying objectives will not be frequent. Conversely, however, undermining the general purposes of the Code through an overly literal application of each of its technical provisions cannot be justified. Here it is evident that the taxpayers' investment remained in corporate solution

---

3 In sustaining the contention of the taxpayer that a reorganization had occurred, the Court stated:

"Some contention, however, is made that this transaction did not meet the statutory standard because the properties acquired by the new corporation belonged at that time to the committee and not to the old corporation. That is true. Yet, the separate steps were integrated parts of a single scheme. Transitory phases of an arrangement frequently are disregarded under these sections of the revenue acts where they add nothing of substance to the completed affair. *Gregory v. Helvering*, 293 U. S. 465; *Helvering v. Bashford*, 302 U. S. 454. Here they were no more than intermediate procedural devices utilized to enable the new corporation to acquire all the assets of the old one pursuant to a single reorganization plan." 315 U. S. at 184-85.

(aside from the \$6.36) and merely changed its form. The only additional factor was the payment of \$16 per share which was in reality tantamount to a contribution to capital and that, of course, is no occasion for the imposition of a tax. Nor was there any opportunity for the taxpayers to use this transaction for a bail-out of earnings and profits. On the other hand, if the Commissioner prevails, taxpayers' equity investment will be turned into ordinary income.

Wholly aside from these considerations of a general nature, an examination of the specific objections made by the Commissioner reveals that at the maximum, this division strayed from the literal terms of Section 355 in only very minor respects.

A. "*Distributes . . . with respect to its stock.*"

From the taxpayers' point of view, they found themselves holding two pieces of paper, a certificate for 1,540 shares of Pacific, and a certificate for 1,540 rights, which when exercised, together represented their ownership in Pacific's assets, including a \$16 capital contribution, certainly not an income-producing act. They were neither richer nor poorer. Neither the receipt of the rights certificate and its exercise nor the capital contribution produced any income to them. The Tax Court quite properly observed that

"If Congress had intended that a distribution of the Northwest stock be treated as tax-free when made without consideration, it is inconceivable that it could have intended the transaction to result in taxable income to the distributees where they *paid out* money in connection with receiving such stock." (Emphasis in original.) 45 T. C. 71.

Subsection (a)(1)(A)(i) requires that the stock of Northwest be distributed by Pacific with respect to the Pacific stock. The Commissioner argues that in fact Pacific distributed only stock rights with respect to its stock and that the Northwest stock was exchanged for six rights, which could have been purchased through the market by anyone and \$16 and, thus, qualification under Section 355 is barred because a distribution of stock rights does not satisfy the statute. We think the result contended for by the Commissioner is precluded by *Palmer v. Commissioner*, 302 U. S. 63 (1937) and *Choate v. Commissioner*, 129 F. 2d 684 (2 Cir. 1942). Normally, the distribution of a stock right has no tax consequences because there is no distribution of corporate property until the right is exercised.<sup>4</sup> A sale or exchange of a stock right prior to exercise results in a tax only because it is an anticipation of gain from an exercise. It follows in this case that it is the actual distribution of the Northwest stock upon the exercise of the rights that is the relevant event and the use of the stock rights as a mere mechanism to accomplish this result should be disregarded. Compare *Kimbell-Diamond Milling Co. v. Commissioner*, 14 T. C. 74 (1950), *aff'd*, 187 F. 2d 718 (5 Cir. 1951); *Heller v. Commissioner*, 2 T. C. 371 (1943), *aff'd*, 147 F. 2d 376 (9 Cir. 1945).

Secondly, the Commissioner argues that the phrase "distribution . . . with respect to its stock" is a term of art that excludes the use of a cash consideration such as the \$16 required here. He cites no authority for this proposition and we are aware of none. It is perfectly obvious that the Code does not contemplate the receipt of cash by a corporation in connection with a distribution with

---

4 Possible exceptions such as Section 305(b) have no application to the instant transaction.



respect to its stock in the sense that some specific section of the Code spells out the tax result. See Sections 311(a) and 312(d). But it scarcely follows that the Code prohibits the receipt of cash or that if the instant transaction is classified as falling within Section 355, the tax consequences cannot be determined. The only additional factor present is the payment of the \$16 and that can be treated very simply as a contribution to capital by a shareholder. However, this question is not before us.<sup>5</sup>

The ultimate question before us is whether, when a reorganization is coupled with another transaction, these two transactions can, or should, be re-separated for federal income tax purposes. When it suits the Commissioner's convenience, he has so argued. See, *e.g.*, Rev. Rul. 61-156, 1961-2 C. B. 62; Regulations 1.301-1(e) and 1.331-1(e). And if the Code is to conform as closely as possible to economic reality, such a division should be performed when necessary. Of course, if the coupling itself is promotive of the evils which the taxing statute was designed to prevent, a separation for tax purposes should not be made for then the taxpayers would have obtained the best of all possible results to the prejudice of the fisc. Here the Tax Court concluded that no conceivable purpose would be served by denying tax-relief when the taxpayer paid out cash while such relief was granted absent this expense. The Commissioner answers the Tax Court by arguing that the use of transferable stock rights plus the \$16 requirement "predictably will diminish the continuity of ownership." Thus the Commissioner invokes the judicial gloss on the reorganization sections that, with some exceptions, continuity

---

5 Although Pacific appears to have treated the cash obtained from the minority stockholders as gain from the sale of property, that is no bar to these taxpayers.

of interest must be maintained. The short answer to this argument is that it was. The doctrine of continuity of interest has never to our knowledge been used to void a reorganization on the ground that some shareholders might have sold their stock. Indeed, such a rule would void each and every attempted reorganization for with rare exceptions, stock can always be sold as Congress expressly permitted in Section 355(a)(1)(B). Rather, this limitation is applied to the actual result of a transaction: was a continuity of interest in fact maintained? Here over 95% of the shareholders in Pacific before 1961 exercised their rights and became shareholders in Northwest. Further, AT&T itself owned over 80% of the Pacific stock and after the division owned over 80% of both Pacific and Northwest. The doctrine of continuity of interest asks no more.<sup>6</sup>

B. *"Transaction in which gain or loss was recognized."*

The Commissioner further takes the position that qualification under Section 355 is barred by the requirement of Section 355(b)(2)(C) that the trade or business which is being actively conducted by either the controlled or the distributing corporation was not acquired in a transaction in which gain or loss was recognized. Taxpayers argue and the Tax Court agreed that because any gain or loss on the intercorporate transaction was eliminated on the consolidated tax return of these affiliated corporations, this condition of the Section was satisfied. Analysis of the purposes

---

6 In *Commissioner v. Baan*, — F. 2d — (9 Cir. 1967), which arose out of the same corporate division and was decided by the Tax Court with the instant case, it was held that the requirements of Section 355 had not been met. One of the principal grounds of that decision was that while the mere use of stock rights may not preclude a tax-free division, the added condition of a \$16 payment barred the application of Section 355 because of the danger that a continuity of interest would not be maintained.

underlying subsections (b)(2)(C) and (D) prohibits acceptance of this conclusion because the happenstance of affiliation does not remove the danger of purchasing a corporation for the purpose of distributing its stock as a dividend while avoiding the tax on dividends. However, this same analysis of the statute indicates clearly, we think, that 355(b)(2)(C) has no application to this case. The theory underlying 355(b), the active business requirement, is the prevention of the temporary investment of liquid assets in a new business in preparation for a 355(a) division. The primary danger envisioned by the draftsmen of this Section was the creation of the new business and the safeguard was the five-year provision. The reasoning is that if the new business must be operated for at least five years, there will be little incentive to use this device for tax avoidance purposes. The second danger was that instead of creating a new business, the corporation would purchase one which had been in existence for over five years and then distribute its stock in place of a dividend. To safeguard against this possibility, subsections (b)(2)(C) and (D) prohibit acquisition of a trade or business, or of a corporation, in a transaction in which gain or loss was recognized. In our case no new business, no new assets and no new corporation was acquired at all. No liquid assets were temporarily invested nor, in fact, was there any temporary investment. Consequently, the application of these sections to the instant transaction would serve no purpose at all. We think that the draftsmen of Section 355 intended these subsections to apply only to the bringing of new assets within the combined corporate shells of the distributing and the controlled corporations. Therefore, it is irrelevant in this case whether gain was recognized on the inter-corporate transfer.



### C. *Single Distribution.*

Finally, the Commissioner argues that there is an implied requirement in Section 355 that the distribution of stock take place in a single offering and since Pacific utilized two offerings separated by almost two years, the statutory requirement has not been met. It is conceded that there is no direct authority for this proposition but the Commissioner argues that such a result is demanded by the scheme of Section 355. In particular, he refers to subsection (a) (1)(D) which reads as follows:

(D) as part of the distribution, the distributing corporation distributes—

(i) all of the stock and securities in the controlled corporation held by it immediately before the distribution, or

(ii) an amount of stock in the controlled corporation constituting control within the meaning of section 368(c), and it is established to the satisfaction of the Secretary or his delegate that the retention by the distributing corporation of stock (or stock and securities) in the controlled corporation was not in pursuance of a plan having as one of its principal purposes the avoidance of Federal income tax,

\* \* \* \* \*

On its face, this subsection is simply the embodiment of the Congressional decision that only complete, and not partial, divisions were to receive tax-free status and its purpose seems limited to establishing the amount of stock which must be distributed for qualification under Section 355. Both subdivisions require that the distributing corporation distribute an amount of stock in the controlled

corporation constituting control. Subdivision (D)(i) imposes the additional requirement that the distributing corporation distribute all of the stock held "immediately before" the distribution to its shareholders, even if that amount is less than all of the outstanding stock. The quoted language in no way requires a single distribution but is merely the means used to permit distribution of less than all of the outstanding stock in the controlled corporation. Alternatively, the corporation may proceed under (D)(ii) which permits retention of stock to a limited degree. Permitting retention at all is a departure from prior law and from the Congressional policy of complete division at the corporate level. To prevent abuse, Congress added to this subdivision a requirement that the taxpayer affirmatively demonstrate the absence of tax avoidance objectives instead of requiring the Commissioner to move under subsection (a)(1)(B). Here again, the fact that Congress permitted limited retention after the completion of the distribution cannot be said to imply that the distribution must have but a single phase. Thus there is nothing on the face of this subsection that relates to the number of transactions, or their timing, which may be contained in a distribution. These matters are entirely governed by the more flexible "device" clause of Section 355(a)(1)(B) which is fully adequate for this purpose and which clearly is no bar to the qualification of this corporate division. As there is no dispute that in both the original plan and in the fact a complete division occurred, applying the statute in this, the most obvious, manner and giving its words their everyday import compel the conclusion that subsection (a)(1)(D) was satisfied.

The Commissioner, however, contends that the requirements of subsection (a)(1)(D) "undoubtedly" were designed to prevent periodic distributions of stock in the

controlled corporation as a substitute for dividends. The only authority for this proposition is Professor Bittker who, in discussing the requirement of explaining retention to the Secretary, "presumes" this purpose. But Professor Bittker was not addressing himself to the question of a single distribution and the Commissioner omits to cite his further observation in the same paragraph that such an abuse would clearly be prohibited by subsection 355(a)(1)(B), the "device" clause, and thus if that is the purpose of the subsection, it is redundant. He further notes that there does not appear to be any necessity for the provision in any event. Bittker & Eustice, *Federal Income Taxation of Corporations and Shareholders* 479 (2 Ed. 1966). Another commentator states that the requirement of subsection (a)(1)(D) "is designed to differentiate between genuine separations and incidental distributions of a controlled corporation's stock which take the place of current cash dividends." Surrey & Warren, *Federal Income Taxation* 1640 (1962). The Commissioner does not suggest that the instant transaction was not a genuine division nor could it conceivably be considered a substitute for a current dividend.

Whether a corporation has retained stock or distributed it is simply a question of the point in time that the manipulation is examined. The Commissioner argues that this point is immediately after the first transaction and that subsection (a)(1)(D)(ii) prohibits "retaining" over 20% of the stock after this point. The taxpayers argue that the time is after the culmination of the plan of distribution and that subsection (a)(1)(D)(ii) only prohibits an indefinite retention.<sup>7</sup> On its face Section 355 gives little

---

7 While the Plan adopted by Pacific theoretically might have permitted this, the surrounding facts make it certain, as found below, that long-term retention was never intended and, of course, was not the fact. In



guidance but we do know that neither of the purposes suggested for subsection (a)(1)(D) will be defeated by permitting more than one distribution and that the construction of that provision for which the Commissioner argues does not fit easily within its language. But an adequate restriction is already provided by subsection (a)(1)(B).

Further, the incongruity of the result urged by the Commissioner when viewed against other provisions of the Code creates considerable doubt that Congress would intentionally require a single distribution. In 1961 Pacific was the eighth largest non-financial company in the United States and had over 38,000 shareholders. The reorganization resulted in a distribution of over 30 million shares of Northwest stock and raised for Pacific nearly one-half billion dollars. A requirement that such a transaction occur on a single day would be staggering. As far as this Court is aware, none of the other reorganization sections impose such a requirement, aside from the highly limited scope of *Bausch & Lomb Optical Co. v. Commissioner*, 276 F. 2d 75 (2 Cir. 1959), which is not relevant here. Regulations 1.368-2(c); Rev. Rul. 58-93, 1958-1 C. B. 188. See also Sections 332(b) and 337(a).

As it is fairly apparent that neither the Code nor the Regulations require, at least by their terms, a single distribution, such a requirement cannot be read into the Code, at least without a substantial reason. A fair reading of the Commissioner's brief indicates that he fears two problems from the result reached below. First, he suggests the danger of periodic distributions as a substitute for dividends and the tax avoidance that this would permit. But

---

the future, it would be preferable that such plans set out the timetable of distribution more precisely, as undoubtedly the Commissioner will require.



as we have noted, it is not clear that there are tax avoidance possibilities in such a scheme so long as the active business requirements are met; if they could be shown to exist, the "device" clause would prohibit any bail-out.

Second, the Commissioner points to a number of administrative difficulties inherent in permitting more than a single distribution such as leaving open the tax result for several years, the problem of defining the "date of distribution," and the difficulty in ascertaining whether there was control "immediately before" the distribution.<sup>8</sup> But the facts of this case can hardly be said to create the insurmountable administrative difficulties which the Commissioner has paraded before us in his brief. Here only two transactions occurred covering a maximum of three tax years. In fact, the deficiency notice in this case was not sent until July of 1963, two months after the second distribution was authorized. The Commissioner attacks the Tax Court by asserting that its opinion would permit ten distributions of 10% of the Northwest stock, an assertion most doubtful in itself for it overlooks the impact of subsection (a)(1)(B). But that is not our case and it can scarcely be contested that the Code imposes a tax on facts, not expectations. Perhaps the enormity of the administrative difficulties may be measured in part by the failure of the Commissioner to raise the single distribution point in the Tax Court.<sup>9</sup>

---

8 The fact that the two transactions which we hold constituted a single distribution occurred in different tax years is of no significance. Had the transactions occurred in January and December of 1961, we would be faced with the same questions as this case presents. The Commissioner makes no point of the fact that two tax years are involved, nor could he. See *Pridemark, Inc. v. Commissioner*, 345 F. 2d 34 (4 Cir. 1965).

9 In *Commissioner v. Baan*, *supra*, the Ninth Circuit alternatively held that while a single distribution was not required by subsection (a)(1)(D), because of the difficulties in administration, "such distributions

Conceding that some administrative problems will arise from our decision, they hardly provide a justification for denying tax-free reorganization status to a legitimate spin-off that entails none of the tax avoidance features that Section 355 was designed to prevent. In any event, we think it is the task of the Commissioner to resolve these difficulties, not the courts'. Nothing in our opinion prevents the Commissioner from drafting reasonable Regulations limiting the time period within which the entire distribution must be made, or the number of transactions which may be involved, or specifying what advance notice must be provided the Service, or defining the statutory language quoted above. But we are not prepared to apply retrospectively restrictions directed at evils which this case does not present.

The decision of the Tax Court on the Commissioner's petition is affirmed.

## II.

Four of the stock rights issued by Pacific were sold by taxpayers for a total amount of \$6.36. The Tax Court determined that aside from the effect of Section 355, this distribution by Pacific would be taxable as a dividend. The Court further held that Section 355 could have no application until there had actually been a distribution of stock and, thus, where the rights were disposed of prior to exercise, Section 355 had no application. Such an asymmetrical approach to Section 355 is untenable.

---

must not extend over any greater period of time than is reasonably necessary considering the practical problems involved in completing such distributions." While this approach effectively compromises the harshness of the Commissioner's argument, the statute contains no such requirement.

It is well settled that the exercise of a stock right may result in dividend income if the fair market value of the acquired stock exceeds the option price. *Palmer v. Commissioner*, 302 U. S. 63 (1937), *Choate v. Commissioner*, 129 F. 2d 684 (2 Cir. 1942). And since the sale of a right may be an anticipatory realization of dividend income, gain on the sale is similarly taxed at ordinary income rates. *Helvering v. Horst*, 311 U. S. 112 (1940), *Gibson v. Commissioner*, 133 F. 2d 308 (2 Cir. 1943). However, in a transaction to which Section 355 applies, the distribution of stock by a corporation does not result in a dividend even though the distribution was accomplished by the use of stock rights and the option price was less than the fair market value of the acquired stock. The assumption of such cases as *Palmer* and *Gibson* is that a distribution of corporate earnings results from the existence of a "spread." Section 355, on the other hand, is a statutory device for determining that a distribution of capital, rather than of earnings, has occurred and therefore the assumption of those cases is inapplicable. The reasoning of *Gibson*, however, that the sale of a stock right should be taxed the same as an exercise is controlling. Similar reasoning exists in Code Section 1234(a). And see *Rank v. United States*, 345 F. 2d 337 (5 Cir. 1965). Since the gain on an exercise of these rights, although deferred until the sale of the stock, would be capital, we hold that the sale of the rights similarly gave rise to capital gains. The error of the Tax Court was in forgetting that it is not the individual shares of stock received by these taxpayers that qualify under Section 355 but the entire distribution by Pacific.

The decision of the Tax Court on the taxpayers' petition is reversed.



FRIENDLY, *Circuit Judge* (dissenting):

If in 1962 a revenue agent had reviewed the Gordons' 1961 return which, as stipulated, "did not include as income any amount with respect to the sale of rights to purchase Northwest stock or with respect to the exercise of rights to purchase Northwest stock or with respect to the receipt of such stock," he would have been justified in thinking his task was an easy one, at least so far as concerns the point here decided in favor of the taxpayers. Tender of six such rights plus \$16 permitted the purchase of a share of Northwest stock at well below market price.<sup>1</sup> Despite the majority's belief that stockholders realize no income simply because of the receipt of "another piece of paper to evidence their same fractional ownership," *Palmer v. C. I. R.*, 302 U. S. 63 (1937), as interpreted by this court in *Choate v. C. I. R.*, 129 F. 2d 684 (2 Cir. 1943), taught that the sale or exercise of the Pacific rights was dividend income unless some section of the 1954 Internal Revenue Code dictated otherwise. Examining §355, the section held by my brothers to afford a tax shelter, the agent would have encountered subdivision (a)(1)(D), which requires that:

"as part of the distribution, the distributing corporation distributes—

(i) all of the stock and securities in the controlled corporation held by it immediately before the distribution, or

---

1 During the offering period the price of the Northwest shares ranged from \$28.25 to \$25.25. In determining the value of the rights and consequent dividend income the Commissioner used \$26, the average price on October 5, 1961, the day the Gordons exercised their warrants. Taxpayers make no claim that the value of the rights on the day of receipt was less than the amount thus determined.

(ii) an amount of stock in the controlled corporation constituting control within the meaning of section 368(c), and it is established to the satisfaction of the Secretary or his delegate that the retention by the distributing corporation of stock (or stock and securities) in the controlled corporation was not in pursuance of a plan having as one of its principal purposes the avoidance of Federal income tax."

He would readily have ascertained that Pacific had not met the test of clause (i) since, far from having distributed all the Northwest stock "held by it immediately before the distribution," it retained 13,013,969, approximately 43% of the total of 30,460,000 shares. By the same token Pacific had not complied with clause (ii); the 57% of the stock distributed was nowhere near the 80% "constituting control within the meaning of section 368(c)." If Mr. Gordon had displayed Pacific's letter of February 27, 1961, requesting stockholder assent to the plan and advising "It is expected that within about three years after acquiring the stock of the New Company [Northwest], the Company [Pacific] by one or more offerings will offer for sale the balance of such stock, following the procedure described in the preceding paragraph," the agent could have replied that §355 is concerned with acts rather than expectations. He might also have repeated Mr. Justice Stone's oft-quoted statement, as true today as when written: "All the revenue acts which have been enacted since the adoption of the Sixteenth Amendment have uniformly assessed the tax on the basis of annual returns showing the net result of all the taxpayer's transactions during a fixed accounting period, either the calendar year, or, at the option of the taxpayer, the particular fiscal year which he may adopt." *Burnet v. Sanford & Brooks Co.*, 282 U. S. 359, 363 (1931). The agent

would therefore have been obliged to recommend the determination of a deficiency, so far at least as §355 was the basis asserted for the taxpayers' return, and this without even having to consider the Commissioner's basic claim, recently sustained by the Ninth Circuit, *C. I. R. v. Baan*, — F. 2d — (1967), that a distribution of rights to purchase the stock of a controlled subsidiary at less than its fair value is not within §355(a)(1)(A).

If a court would have sustained the agent in litigation during 1962, as it seemingly would have had to do, I fail to perceive how Pacific's action in ridding itself of the remaining Northwest shares in 1963 can justify a different result. The 1961 taxes of the Gordons and other minority stockholders depend on what Pacific did in 1961, not on what it chose to do in 1963. *Burnet v. Sanford & Brooks Co.*, *supra*; see also *Healy v. C. I. R.*, 345 U. S. 278, 281 (1953). When Congress has meant the events of one year to affect the tax for another, it has said so in language all can understand. See, e.g., §§172(b), 381, 382, 1301, 1302, 1303. Although the plan adopted by Pacific in 1961 committed it to offer its shareholders "the right to purchase all of the shares of capital stock of the New Company," the plan also provided, subject to an exception not here material, that "the number of shares to be offered to the shareholders of the Pacific Company in any one offering, the number of offerings to be made, and the price at which said shares shall be offered to the shareholders of the Pacific Company shall be determined by the Board of Directors of the Pacific Company in its sole discretion." The qualification was so broad as to deprive the commitment of legal significance, and while in fact the second distribution occurred within 21 months, it is not difficult to think of circumstances, such as adverse regulatory action or re-



strictions on the procurement of telephone plant due to national emergency, that might have postponed Pacific's need for funds and consequent further distribution of Northwest stock for many years. Moreover, if the 1961 distribution of some 57% of the stock can be metamorphosed into a distribution of 100% by what occurred two years later, I assume my brothers would also give the 1963 distribution of 43%, which clearly would not qualify on its own since Northwest was not then a "controlled corporation" within §355(a)(1)(A), see §368(c), the color now attributed to its predecessor. Furthermore, under my brothers' view that a corporation satisfies §355(a)(1)(D) if it ultimately rids itself of all the stock of the controlled corporation, the shelter of §355 would extend to a 1961 Pacific stockholder who sold his stock before 1963 and to a 1963 stockholder who had not owned Pacific stock in 1961. How this jibes with the recognized purpose of §355 to give tax-free treatment where there is "a continuity of the entire business enterprise under modified corporate forms and a continuity of interest in all or part of such business enterprise on the part of those persons who, directly or indirectly, were the owners of the enterprise prior to the distribution," Regulations §1.355-2(c), passes my understanding.

The inspiration for the magic whereby two distributions of 57% and 43% in different years become one of 100% is my brothers' belief that at the end of the process the position of most Pacific stockholders with respect to Northwest shares they had acquired had changed only in their having paid \$16 per share to retain what they had owned all along, a feeling—which I share—that the instant transaction was motivated by business considerations and not by a desire for tax avoidance, and an apparent view that



§355(a)(1)(D) was an unnecessary or at least a redundant requirement. Yet the stockholders' investment status would also have been unchanged and the Company's motive equally pure if Pacific had never made the second distribution or if Northwest had been only 79% owned from the outset, and, despite the majority's apparent distaste for the view that distribution of rights to purchase corporate property below market value normally constitutes a dividend, I cannot imagine any court would consider that in such event rights offerings like those here made by Pacific were protected by §355.

Congress has simply not seen fit to exempt all distributions where stockholders' investments remain unchanged from a practical standpoint and no tax avoidance motive is manifest; instead it has chosen to lay down extremely specific conditions which a corporation must follow at its peril if it desires to achieve nonrecognition for its stockholders. Complicated tax statutes particularly invite application of Mr. Justice Holmes' precept, "Men must turn square corners when they deal with the Government," *Rock Island, Ark. & La. R.R. v. United States*, 254 U. S. 141, 143 (1920). In §355(a)(1)(D) Congress elected to convert a vague guideline contained in the Regulations under the 1939 Code that "Ordinarily, the business reasons (as distinguished from any desire to make a distribution of earnings and profits to the shareholders) which support the reorganization and the distribution of the stock will require the distribution of all of the stock received by the transferor corporation in the reorganization," Regs. §39.112(b)(11)-2(c), into a specific statutory requirement: Distribute all at once with no questions asked, or, if you prefer, distribute not less than 80% of the stock of the controlled corporation and satisfy the Commissioner that any retention was not

for a forbidden purpose. When Pacific chose not to comply for what it considered valid business reasons, its stockholders must take the consequences.

The Supreme Court has pertinently instructed us to approach revenue acts with the attitude that "the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." *Old Colony R.R. v. C. I. R.*, 284 U. S. 552, 560 (1932), citing *Lynch v. Alworth-Stephens Co.*, 267 U. S. 364, 370 (1925). It has also told us that "the words of statutes—including revenue acts—should be interpreted where possible in their ordinary, everyday senses," *Crane v. C. I. R.*, 331 U. S. 1, 6 (1947); *Hanover Bank v. C. I. R.*, 369 U. S. 672, 687 (1962). A requirement that a corporation distribute all of a controlled corporation's stock held by it "immediately before the distribution," when read against the basic concept of annual tax accounting, can only mean to distribute all at one time<sup>2</sup>—not to distribute 53% and plan to distribute the rest in a later year or years when and as that suited.<sup>3</sup> With all respect, my brothers seem to be emulating Humpty Dumpty when they say that the words of the statute in "their everyday import" authorize such a course,<sup>4</sup> and that

---

2 It is setting up a straw man to suggest that this means that the mechanics of a large distribution must be fulfilled "in a single day."

3 There is the further point, noted in Judge Hamley's able opinion in *Baan, supra*, — F. 2d —, — n. 22, that the concept of *seriatim* distributions might often be inconsistent with the requirement of §355 (b)(1)(A) and (2)(B) that the distributing and controlled corporations shall have actively conducted a trade or business "throughout the 5-year period ending on the date of such distribution."

4 This comment applies also to such statements as that "The quoted language in no way requires a single distribution," that "there is nothing on the face of this subsection that relates to the number of transactions,

the only basis for believing the words mean what they say is the view of a distinguished professor, now endorsed by another court of appeals, who, while thinking that Congress could have been more liberal without seriously affecting the revenue, recognized that "Whatever the validity of the reasons for its existence, §355(a)(1)(D) must of course be complied with." Bittker and Eustice, *Federal Income Taxation of Corporations and Shareholders* §11.07 at 479 (1966). And we do not satisfactorily answer the Commissioner's claim of administrative difficulties by chiding him for failure to have promulgated regulations that would partially seal up the breach in the statute we are attempting to create today. Unless the words used by Congress lead to absurd results, are inconsistent with its apparent purpose, or are filled by history with a meaning different from the ordinary one, none of which can be successfully asserted here, a court's job is to apply what Congress has said.

Since I am in full accord with the Ninth Circuit that Pacific's decision to bypass the requirement of §355(a)(1)(D) prevents §355 from immunizing the income realized on the exercise of the rights,<sup>5</sup> I find it unnecessary to decide whether that court or the instant majority is right as to the transaction's meeting the basic test, §355(a)(1)(A), of being a distribution solely of stock or securities of a controlled corporation with respect to stock of the distributing corporation. Certainly the words have an uneasy fit to the transaction here in question. What Pacific distributed "with respect to its stock" was not "solely stock or securities" of a controlled corporation but rights to purchase

---

or their timing, which may be contained in a distribution," and that "it is fairly apparent that neither the Code nor the Regulations require, at least by their terms, a single distribution."

5 Taxpayers' arguments based on decisions under predecessors of §351 (a) are answered in the opinion in *Baan, supra*, — F. 2d at —.



such stock below market price, and the stock of the controlled corporation was distributed "with respect to" the rights rather than the Pacific stock. But even if the distribution of Northwest stock qualified under §355, I could not agree to reversal of the Tax Court's decision that the proceeds of the sale of rights to purchase Northwest stock constituted ordinary income. *Palmer v. C. I. R.*, *supra*, along with *Choate v. C. I. R.*, 129 F. 2d 684 (2 Cir. 1943), and *Gibson v. C. I. R.*, 133 F. 2d 308 (2 Cir. 1943), instruct us that the value of the rights on receipt would be taxable as ordinary income upon their exercise or sale but for some exemptive provision in the Code. Vaulting the language barriers that seem to prevent the issuance of Northwest stock on the exercise of rights from coming within §355, would not help Pacific's stockholders as to rights they sold. As Judge Raum correctly said, the argument "fails to take into account the nature of Section 355, which is a nonrecognition provision, and can be utilized only by those shareholders who come within its terms"—namely, on the majority's view, shareholders who received a distribution of Northwest stock "in respect of" their Pacific stock. The majority's references to §1234 and to *Rank v. United States*, 345 F. 2d 337 (5 Cir. 1965), are inapposite; what is here sought to be taxed is the initial value of the rights, not a gain on their sale. Taxpayers argue that the Tax Court's holding creates an unjustifiable distinction between a stockholder who sells rights to purchase stock of a controlled corporation and one who sells the stock of the latter on a when-issued basis and exercises rights to cover the sale. But "the Commissioner is justified in determining the tax effects of transactions on the basis in which taxpayers have molded them," *Television Industries, Inc. v. C. I. R.*, 284 F. 2d 322, 325 (2 Cir. 1960). Moreover, the actual answer

may well be that, for reasons heretofore noted, neither the real nor the hypothetical taxpayer is entitled to the benefit of §355.

On the Commissioner's appeal I would reverse the decision as to §355 and remand for consideration of the other grounds advanced by the taxpayers and not dealt with by the Tax Court; on the taxpayers' appeal I would affirm.

200—7-28-67



USCA—3571

RECORD PRESS — 95 Morton Street — New York 14, N. Y. — CHelsea 3-5775





N O. 2 0 8 6 4 ✓

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JOHN E. OELKE, LEON T. GRAVES,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
CENTRAL DIVISION

---

MANUEL L. REAL,  
United States Attorney,  
ROBERT L. BROSIO,  
Assistant U. S. Attorney,  
Chief, Criminal Division,  
MICHAEL HEUER,  
Assistant U. S. Attorney,

600 U. S. Court House,  
312 North Spring Street,  
Los Angeles, California 90012,

**FILED**

NOV 16 1966

WM. B. LUCK, CLERK

Attorneys for Appellee,  
United States of America.



N O. 2 0 8 6 4

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JOHN E. OELKE, LEON T. GRAVES,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
CENTRAL DIVISION

---

MANUEL L. REAL,  
United States Attorney,  
ROBERT L. BROSIO,  
Assistant U. S. Attorney,  
Chief, Criminal Division,  
MICHAEL HEUER,  
Assistant U. S. Attorney,

600 U. S. Court House,  
312 North Spring Street,  
Los Angeles, California 90012,

Attorneys for Appellee,  
United States of America.



## TOPICAL INDEX

	<u>Page</u>
Table of Authorities	ii
I     STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION	1
II    STATUTES INVOLVED	5
III   QUESTIONS PRESENTED	6
IV    STATEMENT OF THE FACTS	7
V     ARGUMENT	10
A.     APPELLANTS WERE NOT PLACED IN DOUBLE-JEOPARDY WITHIN THE CON- TEMPLATION OF THE DOUBLE- JEOPARDY PROVISION OF THE FIFTH AMENDMENT BY VIRTUE OF THE IMPANELLING OF TWO SUCCESSIVE JURIES AT THEIR TRIAL IN THE COURT BELOW.	10
B.     THERE WAS NO ILLEGAL SEARCH OR SEIZURE IN APPELLANT JOHN OELKE'S APARTMENT AT THE TIME OF HIS ARREST ON JUNE 16, 1965, AND EVIDENCE OBTAINED AT THAT TIME BY OFFICERS WAS PROPERLY ADMITTED IN EVIDENCE.	19
CONCLUSION	23
CERTIFICATE	24





## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Abel v. United States, 362 U. S. 217 (1960)	22
Agnello v. United States, 269 U. S. 20 (1925)	22
Brewster v. Swope, 180 F. 2d 984 (9th Cir. 1950)	18
Cornero v. United States, 48 F. 2d 69 (9th Cir. 1931)	19
Crawford v. United States, 285 F. 2d 661 (D. C. Cir. 1960)	12, 18
Downum v. United States, 372 U. S. 734 (1963)	19
Gori v. United States, 367 U. S. 364 (1961)	14, 15, 16
Harris v. United States, 331 U. S. 145 (1946)	22
Himmelfarb v. United States, 175 F. 2d 924 (9th Cir. 1949)	12, 16, 17
Hunter v. Wade, 169 F. 2d 973 (10th Cir. 1948)	12
Ker v. California, 374 U. S. 23 (1963)	21
Killelea v. United States, 287 F. 2d 212 (1st Cir. 1961)	18
Logan v. United States, 144 U. S. 263 (1892)	16
Marron v. United States, 275 U. S. 192 (1927)	22
Opper v. United States, 348 U. S. 84 (1954)	15
Pratt v. United States, 102 F. 2d 275 (D. C. Cir. 1939)	18



	<u>Page</u>
Preston v. United States, 376 U. S. 364 (1964)	22
Simmons v. United States, 142 U. S. 148 (1891)	16
Thompson v. United States, 155 U. S. 271 (1894)	16
United States v. Lefkowitz, 285 U. S. 452 (1932)	22
United States v. Miguel, 340 F. 2d 812 (2nd Cir. 1965)	18, 21
United States v. Narvaez-Granillo, 119 F. Supp. 556 (S. D. Cal. 1954)	12
United States v. Perez, 22 U. S. (9 Wheat. ) 579 (1824)	13, 16
United States v. Stein, 140 F. Supp. 761 (S. D. N. Y. 1956)	15
United States v. Ventresca, 380 U. S. 102 (1965)	23
Wade v. Hunter, 336 U. S. 684 (1949)	12, 13, 16

### Constitution

United States Constitution, Fifth Amendment	6, 10, 12, 13, 19
---	-------------------

### Statutes

Title 18, United States Code, §659	14
Title 18, United States Code, §3231	5
Title 21, United States Code, §176a	1, 2, 3, 4, 5
Title 28, United States Code, §1291	5
Title 28, United States Code, §1294(1)	5



IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JOHN E. OELKE, LEON T. GRAVES,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

I

STATEMENT OF PLEADINGS AND FACTS  
DISCLOSING JURISDICTION

---

On June 30, 1965, the Federal Grand Jury for the Southern District of California returned an indictment in eight counts against the following defendants for the following offenses:

Count One: Against Gary Charles De Jong, Gary Lee Tronmpeter and Alan Hann Oelke, for concealment and transportation of marihuana after illegal importation, in violation of Title 21, United States Code, Section 176a [C. T. 2]. 1/

---

1/ "C. T. " refers to Clerk's Transcript.





Count Two: Against Gary Lee Tronmpeter, Gary Charles De Jong and Alan Hann Oelke, for sale of marihuana after illegal importation, in violation of Title 21, United States Code, Section 176a [C. T. 3].

Count Three: Against Gary Lee Tronmpeter and Alan Hann Oelke, for concealment and transportation of marihuana after illegal importation, in violation of Title 21, United States Code, Section 176a [C. T. 4].

Count Four: Against Gary Lee Tronmpeter and Alan Hann Oelke, for sale of marihuana after illegal importation, in violation of Title 21, United States Code, Section 176a [C. T. 5].

Count Five: Against Alan Hann Oelke, for concealment and transportation of marihuana after illegal importation, in violation of Title 21, United States Code, Section 176a [C. T. 6].

Count Six: Against Alan Hann Oelke, for sale of marihuana after illegal importation, in violation of Title 21, United States Code, Section 176a [C. T. 7].

Count Seven: Against Leon Thais Graves, John Edward Oelke and Alan Hann Oelke, for concealment and transportation of marihuana after illegal importation, in violation of Title 21, United States Code, Section 176a [C. T. 8].

Count Eight: Against Alan Hann Oelke and John



Edward Oelke, for concealment and transportation of marihuana after illegal importation, in violation of Title 21, United States Code, Section 176a [C. T. 9].

Only Counts Seven and Eight relate to Appellant John Oelke, and only Count Seven relates to Appellant Graves.

Pursuant to pleas of not guilty by all defendants, trial by jury was set for August 2, 1965 [C. T. 33, 62]. On August 2, 1965, prior to empanelling of the jury, defendant Gary Lee Tronmpeter changed his plea to guilty. Also prior to empanelling of the jury, counsel for defendant Gary Charles De Jong moved for a severance and separate trial for his client, on the ground that Counts One and Two of the Indictment in which De Jong was charged were based upon transactions unrelated to the other Counts [R. T. 17-21]. <sup>2/</sup> This motion was denied without prejudice. Thereafter a jury was empanelled and sworn to try the defendants then remaining, who were Alan Oelke, Gary Charles De Jong, and appellants John Oelke and Leon T. Graves [R. T. 26-44].

Subsequent to empanelling and swearing of the jury as aforesaid, the defendant Alan Oelke changed his plea, then pleading guilty to Counts Two, Seven and Eight of the Indictment [R. T. 57]. Since the activities of Alan Oelke appeared to the Court to be the only connecting link between the offenses charged to appellants John Oelke and Graves and the offenses charged to defendant De

---

<sup>2/</sup> "R. T." refers to Reporter's Transcript.



Jong, the Court thereafter on August 3, 1965 granted De Jong's motion for a severance in the interests of justice for all defendants concerned [R. T. Supplement covering proceedings of August 3, 1965, 4-14]. The jury already impanelled was used to try defendants De Jong in a separate trial.

A second jury was then selected to try the remaining defendants, who were appellants John Oelke and Graves. This jury was empanelled and sworn on August 4, 1966, and appellants' trial by jury then commenced [R. T. 95-109].

During their trial, on August 5, 1965, appellants John Oelke and Graves waived further trial by jury [C. T. 26, 60], and the jury was excused [R. T. 118, 121]. Thereafter appellants' trial was conducted by the Court sitting without a jury. On August 31, 1965, the Court adjudged defendant Graves guilty of the offense charged in Count Seven of the Indictment [C. T. 45], and further adjudged defendant John Oelke guilty of the offense charged in Count Eight of the Indictment [C. T. 63].

On August 31, 1965, appellant Leon T. Graves was sentenced to a term of ten years, pursuant to Title 21, United States Code, Section 176a [C. T. 45]. Further, on August 31, 1965, appellant John Oelke was sentenced to a term of five years, also pursuant to Title 21, United States Code, Section 176a [C. T. 63].

Appellant Leon T. Graves filed a timely notice of appeal on August 31, 1965. Appellant John Oelke also filed a timely notice of appeal on August 31, 1965.

Jurisdiction of the District Court was based on Title 21,





United States Code, Section 176a, and on Title 18, United States Code, Section 3231.

Jurisdiction of this Court is based on Title 28, United States Code, Sections 1291 and 1294(1).

## II

### STATUTES INVOLVED

Title 21, United States Code, Section 176a reads as follows:

"Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty



years and, in addition, may be fined not more than \$20,000.

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

"As used in this section, the term 'marihuana' has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954."

### III

#### QUESTIONS PRESENTED

1. Were the appellants John Oelke and Graves unlawfully placed in double-jeopardy within the contemplation of the double-jeopardy provision of the Fifth Amendment to the United States Constitution by virtue of the impanelling of two successive juries at the trial in the court below?

2. Was Government's Exhibit Number 3 in evidence at the trial below the product of an unreasonable search and seizure of appellant John Oelke's apartment at the time of the said appellant's arrest on June 16, 1965?



#### IV

#### STATEMENT OF THE FACTS

On June 10, 1966, Gordon Douglas Brucker, an informant of the Federal Bureau of Narcotics, met with Alan Oelke at a parking lot on the corner of La Cienega and Centinela in the city of Inglewood, California [R. T. 137, 139]. At that time the informant was told by Alan Oelke that the latter's brother, appellant John Oelke, was engaged with Alan Oelke in the sale of marihuana [R. T. 145]. Brucker told Alan Oelke that he desired to purchase twenty-five kilograms of marihuana [R. T. 145], and it was agreed that Brucker should call Alan Oelke or John Oelke on June 15 or June 16, 1966, between five and six o'clock p. m., to arrange for delivery of the marihuana [R. T. 146].

On June 15, 1966, Brucker telephoned the number of the apartment where appellant John Oelke and Alan Oelke resided [R. T. 147]. Brucker spoke to both John Oelke and Alan Oelke on the telephone. John Oelke asked Brucker whether he wanted to pick up marihuana that night [R. T. 149], and Alan Oelke agreed with Brucker to sell Brucker twenty-five kilograms of marihuana at about seven o'clock p. m. at or near the Oelkes' apartment on the following night, June 16, 1966 [R. T. 150]. This telephone conversation was monitored and overheard by Federal Narcotics Agent Harrison D. Paulus [R. T. 478-481].

At about 7:05 p. m. on June 16, 1966, Brucker, who had been given \$1,950 in Government funds to make the purchase from





the Oelkes [R. T. 154], drove to the vicinity of the Oelkes' apartment, which was located at 7102 La Cienega, Apartment 4, near the intersection of La Cienega and Glenway in Inglewood [R. T. 154]. Brucker saw John Oelke and Alan Oelke standing in the driveway in front of a garage on Glenway, which adjoined the apartment building where the Oelkes resided [R. T. 155]. John Oelke came over to Brucker's car and told Brucker to come with him to the Oelkes' nearby apartment to wait while Alan Oelke obtained the marihuana [R. T. 156]. Brucker and John Oelke then went to Apartment 4, 7102 La Cienega, where they were joined in several minutes by Alan Oelke [R. T. 156]. Between the time when Brucker and John Oelke went to the apartment and the time when Alan Oelke joined them, appellant Leon T. Graves approached the garage carrying a cardboard box and met with Alan Oelke [R. T. 219-220]. This box was later identified as then containing 21, 234.3 grams of marihuana. Appellant Graves and Alan Oelke entered the garage, Graves still carrying the box, then exited in a moment empty-handed and closed the garage door [R. T. 221, 224].

When Alan Oelke had joined Brucker and John Oelke in the apartment, Alan Oelke told Brucker that he had the marihuana ready for delivery and asked for the purchase money [R. T. 156]. Brucker objected, stating that Alan Oelke would only be paid on delivery of the marihuana [R. T. 157]. Brucker and Alan Oelke then went downstairs to the garage on Glenway [R. T. 157]; Alan Oelke opened the door of the garage and showed Brucker the



marihuana contained in the box which Graves had brought [R. T. 158]. Brucker went out and got his car, then backed the car up to the garage door. He alighted, returned to the garage, and began to examine and count the bricks of marihuana contained in the box, making a small slit in the paper covering of each brick as he counted [R. T. 159]. At that time, when Brucker had counted twelve or thirteen bricks, federal agents entered the garage and placed both Alan Oelke and Brucker under arrest [R. T. 159].

During all of the events recounted above which occurred on June 16, 1966, Brucker was equipped with a Kell transmitter which had been placed on his person by Federal Bureau of Narcotics Agents, and by means of this transmitter agents were able to overhear the conversations of Brucker with John Oelke and Alan Oelke. This was testified to by Federal Narcotics Agent Joseph E. Kruger [R. T. 208-209] and Theodore J. Yanello [R. T. 314].

At approximately 7:25 P. M. on June 16, 1966, which was about the time when Alan Oelke and Brucker were placed under arrest in the garage, a federal agent entered Apartment 4 at 7102 La Cienega, where John Oelke had remained, and placed John Oelke under arrest [R. T. 426]. At that time John Oelke was hiding in a closet in his bedroom in the apartment. The agent who arrested John Oelke found in the same closet, at the time of the arrest, 2,734.065 grams of marihuana contained variously in a shoe box, a glass jar, and a tin can [R. T. 426-428].



ARGUMENT

- A. APPELLANTS WERE NOT PLACED IN DOUBLE-JEOPARDY WITHIN THE CONTEMPLATION OF THE DOUBLE-JEOPARDY PROVISION OF THE FIFTH AMENDMENT BY VIRTUE OF THE IMPANELLING OF TWO SUCCESSIVE JURIES AT THEIR TRIAL IN THE COURT BELOW.
- 

As is set forth in Section I of this brief, supra, the action involving appellants below was called for jury trial on August 2, 1965 [C. T. 33, 62]. At that time there were five defendants to be placed on trial: Gary Lee Tronmpeter, Gary Charles De Jong, Alan Oelke, and appellants John Oelke and Leon T. Graves. Prior to empanelling of the jury, defendant Tronmpeter changed his plea to guilty. Defendant De Jong then moved unsuccessfully for a severance of his trial from that of the other defendants. In support of his motion for such severance, counsel for De Jong made the following statement [R. T. 18]:

"MR. HARRIS: I want to point out to the Court that when the case goes to trial, it appears that the defendants will be Gary Charles De Jong and John Edward Oelke and that Mr. De Jong is charged with offenses happening on June 7, 1965, and John Oelke is charged on June 16 or 17, 1965, involving different times, different places, and as far as my client is concerned, a very large and different amount of





marihuana. I think it is distinctly to the prejudice of Mr. De Jong to be tried along with Mr. John Oelke. . . ."

On August 2, the Court denied Mr. De Jong's motion for severance, without prejudice [R. T. 21]. Thereafter, a jury was impanelled and sworn to try the four defendants who remained after Tronm-peter had entered his guilty plea [R. T. 26-44].

Subsequent to the impanelling of this jury, defendant Alan Oelke entered a plea of guilty [R. T. 57]. As the Indictment below shows, Alan Oelke was the only defendant whose alleged criminal acts were related to those of defendant De Jong on the one hand and to those of appellants John Oelke and Leon T. Graves on the other hand.

On August 3, 1965, subsequent to the impanelling and swearing of the jury but prior to the swearing of the first witness at the trial, defendant De Jong renewed his motion for severance of his trial from the trial of appellants. The Court then granted this motion for severance, and the jury already impanelled and sworn for the trial of four defendants was used to try De Jong alone [R. T. Supplement covering August 3, 1965 proceedings, 4-14].

The Court then proceeded, on August 4, 1965, to impanel and swear a second jury for the trial of appellants Oelke and Graves. Appellants' trial then proceeded on and after that date.

Based upon the foregoing, appellants make the following contentions upon this appeal:



That when the first jury was sworn for appellants' trial jeopardy attached for the first time; that when the second jury was sworn appellants were placed in jeopardy a second time for the same offense upon the same indictment; and that therefore appellants were placed twice in jeopardy in contravention of their rights under the Fifth Amendment to the United States Constitution.

The Fifth Amendment provides:

" . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ."

Appellants in their respective briefs point to the general rule that jeopardy attaches in a jury trial once the jury has been impanelled and sworn.

Crawford v. United States, 285 F.2d 661

(D. C. Cir. 1960);

Hunter v. Wade, 169 F.2d 973, 975 (10 Cir. 1948);

Himmelfarb v. United States, 175 F.2d 924

(9 Cir. 1949);

United States v. Narvaez-Granillo, 119 F. Supp. 556

(S. D. Cal. 1954).

Appellants' reason that, since jeopardy attached upon the swearing of the first jury, a second or double jeopardy attached upon the swearing of the second jury and subsequent proceedings violated the Fifth Amendment and are void. For appellants, this is the end of the matter; under the law, however, it is only the beginning.

As the United States Supreme Court pointed out in Wade v.



Hunter, 336 U. S. 684, 688-689 (1949):

"The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. . . .

"When justice requires that a particular trial be discontinued is a question that should be decided by persons conversant with factors relevant to the determination. . . ."

Where legal necessity of various types impinges upon a trial which has begun with one jury, that jury may be discharged and a second jury impanelled and sworn without a violation of the Fifth Amendment resulting. This rule of law, discussed hereinafter, has been inbedded in American constitutional law since it was first expounded by the United States Supreme Court in United States v. Perez, 22 U. S. (9 Wheat.) 579 (1824). The present case, where the first jury was discharged in order to afford the benefits of a separate trial and substantial justice to Gary Charles De Jong, is clearly an appropriate one for the application of this rule.

Concerning the circumstances under which a defendant may properly be tried by a second jury subsequent to discharge of a





first, previously sworn jury in his case, a relatively recent opinion of the United States Supreme Court is clearly in point. The case of Gori v. United States, 367 U.S. 364 (1961) presents many striking similarities to the case at bar. In that case the petitioner, Gori, was accused of receiving stolen goods in violation of Title 18, United States Code, Section 659. On the first day of Gori's trial, during the examination of the Government's fourth witness, the Court on its own motion withdrew a juror and declared a mistrial, dismissing the jury. Mr. Justice Frankfurter in his opinion in Gori states that the reasons for this action by the Court were unclear, but notes that the Court of Appeals had concluded on its review that the trial judge was acting according to his convictions in protecting the rights of the accused when he dismissed the jury. It should be carefully noted that in the case at bar, unlike Gori, the judge's reason for discharging the first jury is clear from the record: it was to provide substantial justice to all defendants by providing a separate trial for defendant Gary Charles De Jong [R. T. Supplement covering proceedings of August 3, 1965, 4-14].

In Gori a second jury was impanelled and sworn after the discharge of the first. At this second trial Gori was convicted. On petition to the Supreme Court, Gori made a contention identical to that of the appellants in the case at bar: that the second trial violated the rule against double-jeopardy because jeopardy had once previously attached to him at his first trial. The Supreme Court rejected this contention and affirmed Gori's conviction.



Mr. Justice Frankfurter wrote (367 U.S. at 367-368):

"Since 1824 it has been settled law in this Court that 'the double-jeopardy provision of the Fifth Amendment . . . does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment' (citing cases). . . .

Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment. "

Whether to grant a severance for trial is, it should be noted, a matter peculiarly within the discretion of the trial judge.

Opper v. United States, 348 U.S. 84, 95 (1954);

United States v. Stein, 140 F. Supp. 761, 765-766

(S.D. N.Y. 1956), and cases cited therein.

The Court below made its intelligent decision that the ends of substantial justice would best be served by trying appellants John Oelke and Graves separately from defendant Gary Charles De Jong after defendant Alan Oelke had pleaded guilty. Thus, under the authority of Gori, it should be found that appellants were not subjected to unconstitutional jeopardy.



The argument put forth by appellants is an arid and scholastic one. Appellants do not even contend that the impanelling of two successive juries for their trial resulted in any prejudice to them. On the record, it is clear that there was no such prejudice. Yet, because the first jury was discharged before a shred of oral evidence had gone in (unlike Gori, supra, where four witnesses had been heard from), appellants now demand a reversal. The law provides no such windfall to persons convicted of crime.

Some of the forms of legal necessity which justify a court in discharging a jury and ordering a subsequent trial without consequent unconstitutional double jeopardy are: the case where the first jury is unable to agree, United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824); Logan v. United States, 144 U.S. 263 (1892); the case where the trial judge discovers that a juror was disqualified and sua sponte dismisses the jury, Thompson v. United States, 155 U.S. 271 (1894); the case where the trial judge discovers that a juror was biased and likewise sua sponte dismisses the jury, Simmons v. United States, 142 U.S. 148 (1891); and the case where, at a military court-martial, the commission is withdrawn from one court and given to another because of military necessity, Wade v. Hunter, 336 U.S. 684 (1949). It is submitted that the necessity to furnish a separate trial to defendant De Jong in the case at bar is likewise a sufficient basis on which to invoke the rule.

The Ninth Circuit Court of Appeals has adopted the foregoing rules in toto. In the case of Himmelfarb v. United States,





175 F.2d 924 (9 Cir. 1949), the trial judge granted a mistrial on motion of one of the two defendants as a result of an improper remark by the prosecutor in opening statement. The other defendant thereupon moved for dismissal and that a plea of once in jeopardy be entered. The Court denied the motion, and another jury tried and convicted the defendants. On appeal the moving defendant argued that the latter ruling was error and that the defendant had been placed twice in jeopardy. The Court of Appeals rejected this contention, holding that a legal necessity had existed for the impanelling of the second jury:

" . . . 'in the federal courts the recognized rule is that discharging a jury before verdict in a matter within the sound discretion of the trial court . . . a defendant who pleads double jeopardy has the burden of proving abuse of such discretion. United States v. Potash, 2 Cir., 118 F.2d 54, 56, certiorari denied, 313 U.S. 584' . . . ."

Just so in the present case: unless this Court can find that an abuse of discretion occurred when the Court below granted a severance for trial, it should affirm the judgment of conviction.

As to the abstract question of whether, as a matter of legal theory, jeopardy with respect to the first jury is deemed nullified when the jury is discharged, or whether jeopardy is deemed not to have attached at all, it is submitted that this question is not truly germane to the case at bar. Indeed, this abstract question has not been finally determined, nor need it be in the course of deciding



this appeal.

See: Crawford v. United States, 285 F.2d 661, 662  
(D. C. Cir. 1960).

Numerous other opinions of the federal appellate courts uphold the rule that a defendant may be retried without unconstitutional double jeopardy resulting in cases where the first jury was discharged because of a legal necessity.

United States v. Miguel, 340 F.2d 812  
(2 Cir. 1965);

Killelea v. United States, 287 F.2d 212  
(1 Cir. 1961);

Crawford v. United States, 285 F.2d 661  
(D. C. Cir. 1960);

Brewster v. Swope, 180 F.2d 984 (9 Cir. 1950).

The statement of this rule by the Court of Appeals for the District of Columbia Circuit in Pratt v. United States, 102 F.2d 275, 280 (D. C. Cir. 1939) is especially appropriate:

"There is no better settled rule than that courts of justice may discharge a jury and order subsequent trial with no right in the defendant to contend that his constitutional rights have been invaded. This action has been taken in the past for many reasons that have manifested themselves, and will be taken in the future for many other proper reasons which will manifest themselves, in the administration of justice."



The cases of Downum v. United States, 372 U.S. 734 (1963), and Cornero v. United States, 48 F.2d 69 (9 Cir. 1931), do not compel or even suggest a result favorable to appellants on the double jeopardy aspect of this case. Those two decisions hold that a defendant may not be retried by a second jury where the first jury has been discharged as a convenience to the prosecution, because prosecution witnesses have been unavailable when the first jury was impanelled and sworn. We do not have that case here. The Government's counsel did not press for De Jong's severance for trial in the court below, and in fact initially opposed it.[R. T. 20]. No purpose of the Government was served, or could have been served, by the severance.

In view of the foregoing authorities, it is submitted that neither appellant John Oelke nor appellant Graves was exposed below to double jeopardy in violation of the Fifth Amendment to the United States Constitution.

B.        THERE WAS NO ILLEGAL SEARCH OR SEIZURE IN APPELLANT JOHN OELKE'S APARTMENT AT THE TIME OF HIS ARREST ON JUNE 16, 1965, AND EVIDENCE OBTAINED AT THAT TIME BY OFFICERS WAS PROPERLY ADMITTED IN EVIDENCE.

---

Appellant John Oelke, for himself alone, raises in his brief on appeal the contention that at the time of his arrest the arresting officers unlawfully seized marihuana from the scene of his arrest. This marihuana, 2734.065 grams in weight, which was described





as two bags of marihuana (containing 6 plastic bags and cans) plus 2 bricks (kilos) of marihuana, was identified and received at the trial below as Government's Exhibit Number 3 in evidence [C. T. 29]. Appellant John Oelke specifies as error the admission of this evidence at his trial.

John Oelke was arrested on June 16, 1965, at approximately 7:30 p. m., by Agent Charles D. Sherman of the Federal Bureau of Narcotics. The arrest occurred in Apartment 4, 7102 La Cienega Boulevard, an apartment which John Oelke and members of his family, including his brother, Alan Oelke, occupied as a residence [R. T. 426-438].

At the trial below, Agent Sherman testified as to the circumstances of John Oelke's arrest [R. T. 426-438].

We must first inquire whether there was probable cause for the arrest of appellant John Oelke. Agent Sherman testified at the trial, with respect to probable cause, as follows: prior to the arrest, he was advised by Agent Harrison D. Paulus that on August 15, 1965, informant Brucker had placed a phone call to the Oelke residence and had made arrangements for the purchase of marihuana to take place on August 16, 1965 [R. T. 447]. On August 16, Agent Sherman was advised by other agents on the radio that a team of narcotic agents had observed Brucker meet with John Oelke on Glenway in the vicinity of the Oelke apartment and that the two had entered the apartment and had a conversation which was monitored by the agents [R. T. 447]. Agent Sherman was further advised by radio on August 16 that Alan Oelke and



appellant Graves had made a delivery of marihuana to Brucker in the garage on Glenway near the apartment [R. T. 448]. Agent Sherman then entered the apartment, where he found John Oelke in a closet in the bedroom [R. T. 426]. Agent Sherman found in the same closet, at the time of the arrest, 2,734.065 grams of marihuana which later became Government's Exhibit 3 at the trial below [R. T. 426-428].

It is submitted that these facts speak for themselves and that probable cause for the arrest of John Oelke was present at the time when Agent Sherman arrested him. It is well established that hearsay evidence (such as the information which Agent Sherman received from the other agents) is admissible on the question of probable cause to arrest.

Ker v. California, 374 U.S. 23, 36 (1963);

United States v. Miguel, 340 U.S. 812, 814

(2 Cir. 1965).

These reports, given to Agent Sherman by other agents including Agent Paulus on August 15 and 16, 1965, would support a reasonable belief on Agent Sherman's part that John Oelke was then engaged with his brother Alan in a set of acts designed to result in a sale of marihuana to informant Brucker. Thus, the arrest of John Oelke was supported by probable cause and was lawful.

Given that the arrest of John Oelke was lawful, it clearly follows that the search and seizure of the 2,734.065 grams of marihuana found in the closet with John Oelke were lawful. For the search was contemporaneous with the arrest as to both place



and time. It follows also that possession of this contraband by John Oelke may be shown, by means of Agent Sherman's testimony hereinabove cited, to support the conviction of John Oelke of the offense charged in Count Eight of the Indictment.

Agnello v. United States, 269 U.S. 20 (1925);

Marron v. United States, 275 U.S. 192 (1927);

United States v. Lefkowitz, 285 U.S. 452 (1932);

Abel v. United States, 362 U.S. 217, 237 (1960).

Indeed, the search of an entire residence incident to a valid arrest has been upheld.

Harris v. United States, 331 U.S. 145 (1946).

"Unquestionably, when a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime . . . .

This right to search and seize without a search warrant extends to things under the accused's immediate control, . . . , and, to an extent depending on the circumstances of the case, to the place where he is arrested. . . . The rule allowing contemporaneous searches is justified, for example, . . . , by the need to prevent the destruction of evidence of the crime . . . ." Preston v. United States, 376 U.S. 364, 367 (1964).





It is evident on the facts of this case that, if Agent Sherman had not seized the marihuana from the closet when he arrested John Oelke, the marihuana could easily have been secreted or destroyed. The acts of Agent Sherman in seizing the marihuana, which was in John Oelke's possession and control, were not only lawful, but necessary as well.

See: United States v. Ventresca, 380 U.S. 102, 106-107  
(1965).

Accordingly, it is submitted that the marihuana taken from the closet where appellant John Oelke was arrested was not the product of unlawful search and seizure, and was properly admitted into evidence at trial.

### CONCLUSION

For the reasons stated above, the judgment of conviction should be affirmed.

Respectfully submitted,

MANUEL L. REAL,  
United States Attorney,

ROBERT L. BROSIO,  
Assistant U. S. Attorney,  
Chief, Criminal Division,

MICHAEL HEUER,  
Assistant U. S. Attorney,

Attorneys for Appellee,  
United States of America.



## CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Michael Heuer  
MICHAEL HEUER



UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

EARL JOHN WILSON,

Petitioner and Appellant,

vs.

LAWRENCE E. WILSON, Warden  
San Quentin State Prison  
San Quentin, California

Respondent and Appellee.

No. 20865 /

APPELLEE'S BRIEF

THOMAS C. LYNCH, Attorney General  
of the State of California

ROBERT R. GRANUCCI  
Deputy Attorney General

PAUL N. HALVONIK  
Deputy Attorney General

6000 State Building  
San Francisco, California 941  
Telephone: 557-1338

Attorneys for Respondent-Appellee

FILED

MAY 26 1966

WM. B. LUCK, CLERK





## TOPICAL INDEX

	<u>Page</u>
JURISDICTION	1
STATEMENT OF THE CASE	2
ARGUMENT	2
THE RULE OF ESCOBEDO SHOULD NOT BE APPLIED RETROACTIVELY	2
CONCLUSION	4
CERTIFICATE OF COUNSEL	5

## TABLE OF CASES

<u>Carrizosa v. Wilson</u> 244 F.Supp. 120 (N.D.Cal. 1965)	2
<u>Escobedo v. Illinois</u> 378 U.S. 478 (1964)	2



UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

EARL JOHN WILSON,

Petitioner and Appellant,

vs.

LAWRENCE E. WILSON, Warden  
San Quentin State Prison  
San Quentin, California

Respondent and Appellee.

No. 20865

APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause has been issued.

/

/

/

1.



## STATEMENT OF THE CASE

According to appellant's allegations in his petition to the district court, he was convicted, on February 6, 1964, of violating California Penal Code sections 261 (rape) and 459 (burglary).

After filing petitions for habeas corpus with state courts, appellant filed an application for a writ of habeas corpus in the United States District Court for the Northern District of California, Southern Division on January 28, 1966. The petition was denied on February 4, 1966, on the authority of Carrizosa v. Wilson, 244 F.Supp. 120 (N.D.Cal. 1965), which held that Escobedo v. Illinois, 378 U.S. 478 (1964) does not apply retroactively to affect convictions final before June 22, 1964.

Appellant's application for certificate of probable cause was granted on March 9, 1966.

## ARGUMENT

### THE RULE OF ESCOBEDO SHOULD NOT BE APPLIED RETROACTIVELY

Appellant seeks to upset his conviction by urging a retroactive application of the exclusionary rule of Escobedo v. Illinois, 378 U.S. 478 (1964). Appellant's conviction became final in February of 1964. The United States District Court, Northern District of California, Southern Division, has ruled in Carrizosa v.





Wilson, 244 F.Supp. 120 (N.D. Cal. 1965) that Escobedo is not to be applied retroactively. The district court below rejected appellant's contention, basing its conclusion on that authority. The Carrizosa case is presently before this Court (No. 20304) and the issue of the retroactivity of Escobedo has been extensively briefed therein by the Office of the Attorney General of California. Additional copies of the Carrizosa brief have been filed with this Court for its use in the instant appeal and a copy has been served upon appellant Wilson. The argument as presented in the Carrizosa brief is hereby incorporated by reference into this brief, and, we submit, completely disposes of appellant's contention in this regard. Appellant also asserts that his confession was coerced. But this allegation is purely conclusionary and appears to be based in his Escobedo allegations.

/

/

/

/

/

/

/

/



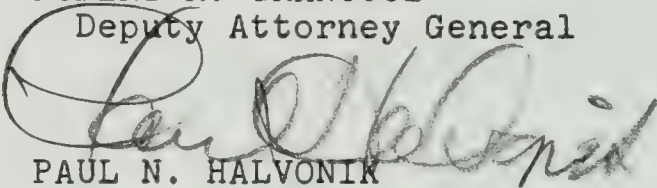
CONCLUSION

For the reasons stated, it is respectfully submitted that the order of the district court denying appellant's petition for a writ of habeas corpus should be affirmed.

Dated: May 20, 1966

THOMAS C. LYNCH, Attorney General  
of the State of California

ROBERT R. GRANUCCI  
Deputy Attorney General



PAUL N. HALVONIK  
Deputy Attorney General

Attorneys for Respondent-Appellee

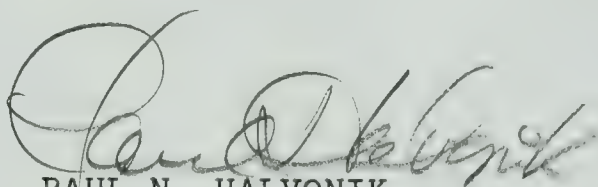
PNH:pp  
CR SF  
66-128



CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

Dated: May 20, 1966

A handwritten signature in dark ink, appearing to read "Paul N. Halvonik", is written over a faint, circular embossed seal. The signature is fluid and cursive.

PAUL N. HALVONIK  
Deputy Attorney General





UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

PETER HERNANDEZ,

Appellant,

vs.

LAWRENCE E. WILSON, Warden  
California State Prison,  
San Quentin, California, et al.)

Appellee.

No. 20874

APPELLEE'S BRIEF

THOMAS C. LYNCH, Attorney General  
of the State of California

ROBERT R. GRANUCCI  
Deputy Attorney General

JAY S. LINDERMAN  
Deputy Attorney General

6000 State Building  
San Francisco, California 94102  
Telephone: 557-1526

Attorneys for Appellee

FILED

JUN 13 1966

WM. B. LUCK, CLERK



## TOPICAL INDEX

	<u>Page</u>
JURISDICTION	1
STATEMENT OF THE CASE	
A. Proceedings in the State Courts	1
B. Proceedings in the Federal Courts	2
SUMMARY OF APPELLEE'S ARGUMENT	3
ARGUMENT	3
CONCLUSION	6



## TABLE OF CASES

	<u>Page</u>
<u>Brown v. Allen,</u> 344 U.S. 443 (1953)	4
<u>Chavez v. Dickson,</u> 280 F.2d 727 & n. 15 (9th Cir. 1960)	4
<u>Davis v. United States,</u> 347 F.2d 374 (9th Cir. 1965)	5
<u>Edwards v. United States,</u> 256 F.2d 707 (D.C. Cir. 1958)	4
<u>Harris v. United States,</u> 338 F.2d 75 (9th Cir. 1964)	5
<u>In re Seiterle,</u> 61 Cal.2d 651 39 Cal.Rptr. 394 P.2d 556 (1964)	5
<u>Kerrigan v. Scafati,</u> 348 F.2d 187 (1st Cir. 1965)	4
<u>People v. Diaz,</u> 206 Cal.App.2d 651 24 Cal.Rptr. 367 (1962)	5
<u>Smith v. United States,</u> 347 F.2d 505 (7th Cir. 1965)	5
<u>Thomas v. United States,</u> 290 F.2d 696 (9th Cir. 1961)	5
<u>Townsend v. Burke,</u> 334 U.S. 736 (1948)	4
<u>Townsend v. Sain,</u> 372 U.S. 293 (1963)	4
<u>United States v. Pate,</u> 345 F.2d 691 (7th Cir. 1965)	4
<u>Wallace v. Heinze,</u> 351 F.2d 39 (9th Cir. 1965)	5
<u>Wilson v. Harris,</u> 351 F.2d 840 (9th Cir. 1965)	6

## TEXTS, STATUTES AND AUTHORITIES

Cal. Pen. Code § § 859 995	5
-------------------------------	---





UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

PETER HERNANDEZ,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 20874
	)	
LAWRENCE E. WILSON, Warden	)	
California State Prison,	)	
San Quentin, California, et al.)	)	
	)	
Appellee.	)	
_____	)	

APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for a writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause has issued.

STATEMENT OF THE CASE

A. Proceedings in the State Courts

On November 19, 1963, appellant, Peter Hernandez, was convicted in the Superior Court of Los Angeles County,



California, in action No. 274944, upon his plea of guilty while represented by counsel, of the felony offense of possession of narcotics in violation of California Health and Safety Code section 11500. He was sentenced on that same date to imprisonment in the state prison for the term prescribed by law.

Appellant did not appeal the above conviction. Rather, he filed a petition for a writ of habeas corpus (No. 41849) in the Superior Court of Marin County, California. That petition was denied without hearing on December 30, 1964. Thereafter, appellant filed a similar habeas corpus petition (No. Crim. 9400) in the California Supreme Court, which also was denied without hearing on October 7, 1965. Substantially the same factual and legal issues now presented to this Court were raised in those petitions.

B. Proceedings in the Federal Courts

On February 2, 1966, appellant filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California, Southern Division (CT 1, 31). On that same date, an order by Judge Wollenberg of that court denying the petition was filed (CT 17, 31).

On February 25, 1966, an order was issued by Judge Wollenberg granting appellant's application for a certificate of probable cause and allowing him to appeal in forma pauperis



(CT 26, 31). A notice of appeal was filed thereafter by appellant on March 17, 1966 (CT 27, 31).

#### SUMMARY OF APPELLEE'S ARGUMENT

Appellant's voluntary plea of guilty prevents collateral attack upon his judgment of conviction on the asserted ground of ineffective representation by counsel at his preliminary hearing. Furthermore, the alleged inadequacies in this regard do not raise a federal question.

#### ARGUMENT

APPELLANT'S VOLUNTARY PLEA OF GUILTY PREVENTS COLLATERAL ATTACK UPON HIS JUDGMENT OF CONVICTION ON THE ASSERTED GROUND OF INEFFECTIVE REPRESENTATION BY COUNSEL AT HIS PRELIMINARY HEARING. FURTHERMORE, THE ALLEGED INADEQUACIES IN THIS REGARD DO NOT RAISE A FEDERAL QUESTION.

Appellant states that he had retained private counsel to assist him in his defense against the criminal charge which ultimately led to the California state court conviction presently under attack. According to appellant, at the time of his state court preliminary examination, he informed the court that his attorney would be unable to be present and requested that the matter be continued. Allegedly this motion was denied and a deputy public defender was appointed to represent appellant at the preliminary examination. Some time later, with his own attorney present then, appellant entered a plea of guilty and was ultimately





sentenced to California State Prison. Appellant contends that his Sixth and Fourteenth Amendment rights were violated when the court declined the aforementioned motion for a continuance.

Initially, we should stress the propriety of the District Court's denial of appellant's petition without having ordered a hearing because his allegations, even if true, would not justify the issuance of a writ of habeas corpus. As will be shown, this is so as a matter of law. In such a situation, the need for a federal hearing is obviated. Chavez v. Dickson, 280 F.2d 727, 734-35 & n. 15 (9th Cir. 1960). And see Townsend v. Sain, 372 U.S. 293, 312 (1963); Brown v. Allen, 344 U.S. 443, 463-65, 506-07 (1953); United States v. Pate, 345 F.2d 691, 696 (7th Cir. 1965); Kerrigan v. Scafati, 348 F.2d 187, 188-89 (1st Cir. 1965).

Because of appellant's guilty plea, his conviction is invulnerable to attack on the basis of the quality of his representation by counsel at his preliminary examination. Edwards v. United States, 256 F.2d 707 (D.C. Cir. 1958). His conviction rests solely upon that voluntary plea entered upon the advice of privately retained counsel and not upon what may have transpired earlier at the preliminary hearing. Townsend v. Burke, 334 U.S. 736 (1948); Wallace v. Heinze,



351 F.2d 39 (9th Cir. 1965); Davis v. United States, 347 F.2d 374 (9th Cir. 1965); Harris v. United States, 338 F.2d 75 (9th Cir. 1964); In re Seiterle, 61 Cal.2d 651, 39 Cal.Rptr. 716, 394 P.2d 556 (1964).

Under California law an accused is entitled to be represented by counsel at his preliminary examination (Cal. Pen. Code § 859), and if denied such representation, an accused can set aside the information and void the proceedings taken at his preliminary examination. See Cal. Pen. Code § 995; People v. Diaz, 206 Cal.App.2d 651, 659, 661, 24 Cal. Rptr. 367, 371, 372 (1962). However, appellant chose not to avail himself of this state court procedure. Thus even if his decision to plead guilty was influenced by the allegedly improper substitution of counsel, a possibility which we find most incredible, such would not be a basis for this belated attempt to upset the conviction. Cf. Smith v. United States, 347 F.2d 505 (7th Cir. 1965); Harris v. United States, 338 F.2d 75, 80 (9th Cir. 1964); Thomas v. United States, 290 F.2d 696, 697 (9th Cir. 1961).

Furthermore, petitioner obviously confuses a preliminary hearing with a trial. The purpose of the preliminary hearing in California is to determine whether there is sufficient evidence upon which an accused may be prosecuted. Emphatically it is not a trial where guilt or innocence is



determined. Nor is it, "in and of itself, a critical stage in the judicial proceedings such as to constitutionally require the appointment of counsel." Wilson v. Harris, 351 F.2d 840, 844 (9th Cir. 1965). In the instant case, appellant does not specify how, in any way, he was prejudiced by the incident at his preliminary examination of which he complains. Clearly, then he has failed to raise a federal question.

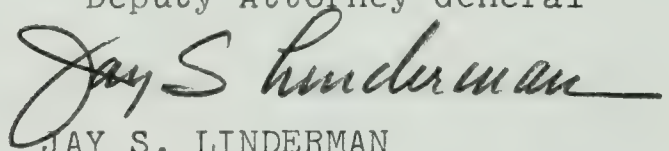
CONCLUSION

For the foregoing reasons, appellee submits that the order of the District Court should be affirmed and the proceedings herein dismissed.

DATED: June 13, 1966

THOMAS C. LYNCH, Attorney General  
of the State of California

ROBERT R. GRANUCCI  
Deputy Attorney General



JAY S. LINDERMAN  
Deputy Attorney General

Attorneys for Appellee

JSL:cmd  
CR SF  
66-57






CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

DATED: June 13, 1966

  
JAY S. LINDERMAN  
Deputy Attorney General







